87-347

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. _____

IN RE:
"AGENT ORANGE" PRODUCT LIABILITY LITIGATION

THOMAS ADAMS, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, SECRETARY OF THE NAVY OF THE UNITED STATES, ATTORNEY GENERAL OF THE UNITED STATES,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Petitioners respectfully request the Supreme Court to overrule *Feres v. United States,* 340 U.S. 135 (1950), because none of the three rationales given in *Feres* for its decision, nor the later rationalization of "military discipline", justifies the continuance of such court-crafted doctrine in the face of the plain language of the Federal Tort Claims Act (FTCA) 28 U.S.C. sec. 1346(b), 2671-2680, which does not contain an "incident to service" exception to its coverage.

II.

In the alternative, if the *Feres* doctrine is held still to be viable generally, it should not be any further extended in scope and should be held *not* to apply to the claims of servicepersons who served in Vietnam, and the derivative claims of their spouses, parents and children, who were injured as the result of pre-induction negligence; in-service negligence where no benefits have been paid to them under the Veterans' Benefit Act (VBA), 38 U.S.C. 101, et seq.; and post-discharge negligence and it should be held also *not* to apply to the independent claims of the wives and children.

III.

The Court of Appeals erred in holding that the "discretionary function exception" to the FTCA, 28 U.S.C. sec. 2680(a), shields the United States from liability with respect to the claims of the Vietnam veterans for pre-induction negligence, in-service negligence where no benefits have been paid by the VBA, post-discharge negligence, and the independent claims of the wives and children of those who served in Vietnam.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioners in this Court and Plaintiffs in the action in the District Court (hereinafter Plaintiffs) are listed in the Appendix 1 attached to this Petition. The names are so numerous that we are using the Appendices for reference purposes to list the parties' Plaintiffs.

Respondents in this Court and the Defendants in the courts below (hereinafter Defendant) are:

UNITED STATES OF AMERICA, SECRETARY OF THE NAVY OF THE UNITED STATES AND THE ATTORNEY GENERAL OF THE UNITED STATES.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order of the district court dated June 19, 1986, dismissing the claims in part and granting summary judgment in part is attached as Appendix 2.

2. The opinion and order of the Court of Appeals, dated April 21, 1987, affirming in part and reversing and remanding in part, 818 F.2d 201 (2nd Cir. 1987), is attached as Appendix 3.

GROUNDS UPON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The judgment of the Court of Appeals was entered on April 21, 1987 (Appendix 3). This Petition for Certiorari was properly transmitted within ninety days from the date of such judgment and opinion. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. It also involves, indirectly, the Veterans Benefit Act (VBA), 72 Stat. 1118, as amended, 38 U.S.C. 301, et seq. (1982 Ed.).

STATEMENT OF THE CASE

A. Course of the Proceedings Below

This case is a part of some of the most important litigation ever to be brought in our courts — the "Agent Orange Litigation". The Vietnam veterans first filed, in the United States District Court for the Eastern District of New York, a class action suit against the chemical manufacturers of Agent Orange, alleging injuries and

deaths as a result of their exposure to the product in Vietnam, where it was used as a defoliant; the class was certified; a purported settlement was reached; a final judgment was entered; and that judgment was appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed; a Petition for Rehearing and Rehearing En Banc was denied; and a Petition for Certiorari in connection with the class action settlement, notice of the class action, and other issues with respect to the suit against the manufacturers, is presently being prepared for filing in this Court.

After the settlement was reached with the plaintiff class concerning the suit against the chemical manufacturers, the plaintiffs filed suit, as a class, against the United States in the case of *Aguiar, et al, Plaintiffs v. United States, et al., Defendants.* The Vietnam veterans alleged, under the FTCA, that they were exposed to Agent Orange in Vietnam and they and, derivatively, their spouses, parents and children (in the death cases) thereby sustained damages for injuries and deaths which were caused by the pre-induction negligence, post-discharge negligence and in-service negligence of the United States and that they had received no benefits under the VBA. The wives and children of the Vietnam veterans alleged, also under the FTCA, independent claims, asserting that the veterans' exposure to Agent Orange in Vietnam had caused them to sustain genetic damage and through intercourse between husband and wife *after* the husband's discharge, the wives were caused to sustain miscarriages and the children were inflicted with birth defects.

The United States filed motions to dismiss and for summary judgment, basically asserting that the court should refuse to certify the class requested by the plaintiffs; that plaintiffs' claims were barred by the doctrine enunciated by the Supreme Court in *Feres v. United*

States, 340 U.S. 135 (1950); that such claims were also barred by the discretionary function, combatant activities and foreign country exceptions to the FTCA, 28 U.S.C. 2680(a), (j) and (k); and that summary judgment should be granted because, as a matter of law, Agent Orange had not been shown to cause any physical harm to the Vietnam veterans or their wives and children. The district court denied the request for certification of the class; dismissed the direct claims of the veterans and derivative claims of the wives, children and parents on the ground that they were barred by *Feres;* and, as to the independent claims of the wives and children, concluded that "no evidence of probative value" had been presented to show that their miscarriages and birth defects had been caused by the veterans' exposure to Agent Orange.[1] See *In re "Agent Orange" Product Liability Litigation,* 603 F.Supp. 239, 242 (E.D.N.Y. 1985).

On appeal, the *Aguiar* plaintiffs appealed *only* the rulings against the veterans and the derivative claims of the wives, parents and children but did not appeal the adverse ruling against the independent claims of the wives and children. The Court of Appeals affirmed the judgment of the court below and held that the *Feres* doctrine and the discretionary function exception barred all of the plaintiffs' claims. See *In re "Agent Orange" Product Liability Litigation; Aguiar, et al. v. United States, et al.,* 818 F.2d 195 (2nd Cir. 1987). (See Appendix 4 to this Petition).

In the meantime, other veterans represented by the undersigned counsel filed suit in the United States District Court for the Southern District of Texas making basically the same allegations as were made in *Aguiar,* See Tabs 1 and 2, Joint Appendix, Vol. 1 (*Adams, et al. v. United*

1. The children's claims were dismissed without prejudice.

States). In the Texas suit, class action allegations were included but all of the veterans represented by counsel in that case were also listed individually. See Appendix 1 to this Petition. The Multi-District Litigation Panel transferred the case to the same district court that was handling the over-all Agent Orange litigation. Basically the same motions that were filed in *Aguiar* were filed against the plaintiffs in this case by the Government and Judge Weinstein, the district judge, dismissed this case on the same grounds as he had dismissed *Aguiar*. See Order, Appendix 2. Whereas, as noted above, the *Aguiar* counsel did not appeal the dismissal by the district court of the independent claims of the wives and children, the counsel in this case included not only the grounds asserted by counsel in the *Aguiar* appeal but as additional grounds complained of the district court's dismissal of the independent claims of the wives and children.

The Court of Appeals affirmed in this case the district court's dismissal of the veterans' claims and the derivative claims of the wives, children and parents on the ground that such claims were barred by the *Feres* doctrine and by the discretionary function exception to the FTCA and reversed the district court's dismissal of the independent claims of the wives and children on the ground of absence of causation and remanded same with directions that the district court "dismiss them for lack of jurisdiction". The Court of Appeals reasoned that the independent claims of the wives and children were also barred by *Feres* and the discretionary function exception to the FTCA and that, therefore, there was no reason to consider the summary judgment which had been granted on the basis of no causation. See *In re "Agent Orange" Product Liability Litigation, Thomas Adams, et al., Plaintiffs-Appellants v. United States, et al., Defendants-Appellees,* 818 F.2d 201 (2d Cir. 1987) (attached as Tab 3).

B. Procedural Facts

These cases center around the use of Agent Orange by the United States Armed Forces in Vietnam for the purposes of defoliating the jungle and destroying the food crops of the enemy. Agent Orange is a 50:50 mixture of dichlorophenoxyacetic acid (2,4-D) and trichlorophenoxyacetic acid (2,4,5-T). It was packaged in 55 gallon drums which had a horizontal orange stripe around the middle of the drum (hence, the "orange" in Agent Orange). As a part of the manufacturing process, a contaminant is created. It is called tetrachlorodibenzo-paradioxin or 2,3,7,8-TCDD. The popular name is dioxin. This manufacturing contaminant, present in greater quantities as the heat, pressure and speed of the manufacturing process are increased, is one of the most toxic compounds known to man. It is the exposure to dioxin which is at the heart of the Agent Orange litigation. Once it enters the human body by inhalation (airways), ingestion (mouth), or absorption (skin), it is lipopyllic, meaning it is preferentially attracted to the fat molecules within the body. There it stays, being largely not excreted, working its insidious and pernicious effects upon the anatomy.

When certain servicepersons filed the *Aguiar* complaint it was admitted that such complaint was created to take advantage and use every possible mechanism to plead around the "incident to service" doctrine. (p. 5 of the Original Brief in *Aguiar*). Since the complaint in this case, the *Adams* case, is structured basically the same as the *Aguiar* complaint, the comments we make now about the *Aguiar* complaint are equally applicable to the *Adams* complaint. The first, composite cause of action contained allegations in separate counts as to pre-induction (Counts I-XXX), in-service (Counts XXXI-LXIV) and post-discharge (Counts LXV-LXXXVI) time frames.

The pre-induction counts sought to show that the operative acts and/or omissions on the part of the United States occurred *prior* to service on the part of the plaintiffs and thus considerations of military discipline had no relevance. These included, inter alia, such negligent acts as failing to warn each inductee of the hezards of Agent Orange prior to induction; in failing to adequately test the Agent Orange prior to each veteran's induction; in failing to require the removal of the dioxin contaminant prior to each veteran's induction; in negligently approving defective specifications for the Agent Orange prior to each veteran's induction; and by distributing, prior to each veteran's induction, a product not fit for intended purposes or safe for use by human beings.

The three court-constructed criteria of the "incident to service" doctrine were said not to be met in relation to the in-service period, see our discussion infra, and that the United States should in any event be estopped to assert the doctrine, because tthe Veterans Administration had denied all claims for benefits of the plaintiffs under the VBA on the ground that the exposure to Agent Orange did not cause any maladies, while at the same time asserting that the damages claimed by the Plaintiffs occurred while they were serving in Vietnam and thus were "incident to service."

The allegations of in-service negligence included the allegations that the previously alleged acts of pre-induction negligence also occurred during each veteran's service and further allegations of failure to monitor, treat and diagnose, or the misdiagnosing of potential health problems arising from exposure to Agent Orange and the failure to provide protective gear, institute instructions as to protective hygiene and take other steps to reduce the hazards of Agent Orange.

As to the post-service period, the plaintiffs alleged that the United States could not invoke military discipline by definition with regard to that period because many of the acts and/or omissions were those of the Veterans Administration and other agencies and departments as opposed to the military. Because of the plaintiffs' concern for case law which spoke of "continuing tort" in relation to post-discharge claims, two entirely separate counts and causes of action were set out. The first cause of action encompassed all three periods and the second cause of action encompassed only the period *after* discharge and it was there asserted the acts of negligence and the consequent damages occurred *after* the veteran was discharged from the service. The complaint not only contained allegations on behalf of the wives and children as being derivative of the veterans claims (for death benefits, loss of consortium, etc.), but also claims for miscarriages and birth defects which were precipitated by intercourse between the veteran and his wife *after* the veteran was discharged. The allegations of post-discharge negligence are further discussed, infra.

C. Basis for Federal Jurisdiction in the District Court.

The basis for jurisdiction in the district court was the FTCA, supra.

D. Reasons Relied Upon For Allowance of Writ.

I. Preliminary statement.

In *United States v. Johnson,* 107 S. Ct. 2063, ____U.S. ____ (May 18, 1987), Justice Antonin Scalia, joined by three other Justices of the Supreme Court, stated in dissent:

> As it did almost four decades ago in *Feres v. United States,* 340 U.S. 135 (1950), the Court today provides several reasons why Congress might

> have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U.S.C. sec. 1346(b), 2671-2680, certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it. We have not been asked by the respondent here to overrule *Feres*; but I can perceive no reason to accept the petitioner's invitation to extend it as the Court does today.

107 S. Ct. at 2070. The Petitioners-Plaintiffs in this case, who sacrified heart, soul and health for this country in Vietnam, now ask the Supreme Court of the United States "to overrule *Feres*".

There could not be a better vehicle for that undertaking than this case. This case involves the plight of thousands of the young people of America—mostly the disadvantaged of our nation—who, instead of going to Canada, Sweden or Torremolinas, accepted their draft notices and were sent off to an undeclared war that most of the American people did not want or much care about and who then served bravely while being exposed to a chemical herbicide that they did not know—nor were they ever told—contained one of the most toxic and deadly chemical compounds known to man.

At least the Vietnam veteran had some general understanding of the perils he faced in fighting the Vietcong but he had no understanding—nor was any effort made to give him any—of the dangers of Agent Orange. The state of the art under war conditions was such that certain methods of spraying, use of prophylatic and protective gear, medical monitoring and other steps could have been taken to drastically reduce the exposure to, and risk of harm from, Agent Orange, without adversely affecting our soldiers' capability to do battle. But absolutely no effort was made by the Government to do these things.

Indeed, the cruel hoax of it all is that so many of those Vietnam veterans who were fortunate enough to have survived the perils of combat were not fortunate enough to have avoided the menaces of Agent Orange. And in another chapter of this cruel hoax, when the veterans, through the help of such people as Maude de Victor, finally realized that those who were exposed to Agent Orange were experiencing certain types of medical problems in unusually large numbers, they got no help—indeed only reproach—from the Veterans Administration and, despite subsequent legislation enacted to encourage the approval of Agent Orange claims, the V.A. continues to this day to stonewall the Agent Orange claimants. Senator Alan Cranston severely criticized the Veterans Administration for its failure to approve Agent Orange claims. See remarks of Sen. Cranston, May 22, 1984, Cong. Rec., S. 6245.

When the late President Eisenhower warned us, in one of his greatest speeches as President, of the military-industrial complex he must have been clairvoyant about the coming plight of the Vietnam veteran. These powerful forces—the chemical companies and the military—arrayed against the virtually powerless veterans have forged together the last and cruelest hoax of all (and indeed a myth)—that long-term exposure to dioxin does not cause *any* health problems. Tragically, the district court and Court of Appeals—without having any evidence before them of clinical analyses of any of the 248,000 claims filed in connection with the settlement with the chemical companies, except for the ten who were going to trial on May 7, 1984[2]—accepted the thesis that there could not possibly be a fact issue on causation as to *any*

2. This was the trial against the chemical companies which was made unnecessary by the settlement reached with the chemical companies in the early morning hours of May 7, 1984. Such settlement is the subject of a separate Petition for Certiorari being filed by the veterans.

claimant, including the ten scheduled to go to trial. Such shocking assumption totally ignored the fact that there was overwhelming evidence in the record—in the form of multiple markers; confirming clinical studies; evidence of strong exposure; corroborating statistical information; favorable interpretations of existing epidemiological studies; animal studies; and the forceful opinions of over fourteen world-class scientists, clinicians, toxicologists, chemical analysts, biostatisticians, epidemiologists, oncologists, internists and other medical causation experts—which clearly established fact issues as to those ten claimants and suggested that thousands of the other 248,000 claimants probably had viable claims as well. The holding of the district court and the strong corroborating statements of the Court of Appeals also undeniably conflict with what has become the majority rule in cases of this type, as recently stated by the District of Columbia Court of Appeals in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), cert. den. 105 S. Ct. 545 (1984).[3]

While the myth of no-causation is not a direct issue before this Court, we mention it because it permeates the rationale employed by the Court of Appeals in reaching its conclusions about the applicability of the discretionary function exception and the *Feres* doctrine.

The pervading essence of the plaintiffs' claims in this case is that the decision to use Agent Orange as a defoliant in Vietnam is not challenged, is

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3. The court in *Ferebee* stated:

> Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony.

736 F.2d at 1534.

not alleged to be negligent and is not a part of the claimed misconduct on the part of the Government. Moreover, it must be understood that most of the negligent and defective design acts asserted by plaintiffs took place in the United States, before the Agent Orange ever reached Vietnam and before it ever became a part of the political process, the discretionary functions of the military, or the whims of the battlefield.

Thus, we have the situation here where the Vietnam veterans—who are finally, just now, being recognized as the real American heroes they have always been—stand before the Highest Court in our land and—having been judicially finessed into a totally inadequate settlement with the chemical companies[4] and having been denied all benefits under the VBA—ask for the justice they deserve but have been denied in all other courts of our land.

II. The *Feres* doctrine should be overturned and the Petitioners ask this Court to do so.

It would not serve any purpose for us to repeat the eloquent arguments made by Justice Scalia, joined by three other Justices, in the dissent in *United States v. Johnson,* 107 S. Ct. at 2070-2076. We agree with Justice Scalia's conclusion that the original three rationale given for the *Feres* doctrine have been displaced or discredited by subsequent decisions and we agree, further, that the later conjured rationale, "military discipline", is judicially inappropriate. Moreover, there is no possible way that "military discipline" can be affected by the types of claims made in this case. Justice Scalia summed up

4. The subject of the gross inadequacy of the settlement [$180 million dollars for 248,000 claims, 128,000 of which involve serious injury or death], and the way in which the class members were finessed into not opting out of the class and a settlement they do not want, is the subject of a separate Petition for Certiorari which will be filed within 90 days of the denial of the motion for rehearing in the case against the chemical companies.

our position with regard to overturning the *Feres* doctrine better than we ever could:

> In sum, neither the three original *Feres* reasons nor the *post hoc* rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. *In re "Agent Orange" Product Liability Litigation,* 580 F.Supp. 1242, 1246 (E.D. N.Y.), appeal dism'd, 745 F.2d 161 (CA 2 1984).
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> * * *
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> . . . because Johnson devoted his life to serving in his country's armed forces, the Court today limits his family to a fraction of the recovery they might ottherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not.

107 S. Ct. at 2074-2076.

We can only hope that those Justices who joined the majority in *United States v. Johnson* will in this, one of the most notable cases ever to come before the Court, seriously consider the opinion of Justice Scalia in *Johnson* and take the courageous, historic step of admitting that the Court made a mistake in 1950.

Principles of *stare decisis* do not preclude such an undertaking. In *The Boys Market, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970), this Court observed that "*stare decis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sound, and verified by experience", citing *Helvering v. Hallock,* 309 U.S. 106 (1940) and *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). 398 U.S.

at 241. In *Boys Market* this Court overruled *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), in an analogous context. In *Sinclair,* the Supreme Court had rendered a decision which Justice Brennan, speaking for the Court, deemed to be "a significant departure" from Congressionally stated policy of promoting "the peaceful settlement of labor disputes", *id.* at 241. After noting that developments subsequent to *Sinclair* supported the need for reconsideration of *Sinclair,* Justice Brennan debunked the contention that the failure of Congress to respond to a decision such as *Feres* implies an acceptance of that decision as valid law, stating:

> Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to *Sinclair* on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouarc v. United States* 328 U.S. 61, 69, 90 L.Ed. 1084, 1090, 66 S. Ct. 826 (1946). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of *Sinclair,* the mere silence of Congress is not a sufficicient reason for refusing to reconsider the decision. *Helvering v. Hallock, supra,* at 119-120, 84 L.Ed. at 612.

398 U.S. at 241-242, 26 L.Ed.2d at 205.

In the case of *Feres,* as Justice Scalia so clearly elucidates in *United States v. Johnson,* the initial decision was directly contradictory to the plain language of the congressionally enacted FTCA; "subsequent developments" (in the form of Supreme Court decisions) have discredited the original rationales stated in *Feres,* further suggesting the need for reexamination of that unfortunate decision; and there has been no indication

from Congress of a "clear design that congressional inaction [should] be taken as acceptance" of *Feres*.

Indeed, in one of the most recent decisions of this Court, *United States v. Stanley*, 107 S. Ct. 3054, ____U.S.____ (June 25, 1987), Justice Scalia, speaking for the Court, discusses the significance of the power given Congress by the Constitution with regard to matters affecting the military and how, once Congress speaks, the Court should give Congress its say. 107 S. Ct. at 3062, 3063. As Justice Scalia reasons in the minority opinion in *United States v. Johnson*, if Congress, with all of its Constitutional power in military matters, had wanted to exempt matters "incident to military service" from FTCA coverage it could have easily done so, but Congress freely—and we believe purposefully—chose not to do so.

We respectfully suggest that this case is the time and the place to remove the blight of *Feres*.

III. Even if the *Feres* doctrine is not over-turned wholesale, it certainly should not be extended to apply to the claims based upon pre-induction negligence, in-service situations where VBA benefits have not been paid, post-discharge negligence and the independent claims of the civilian wives and children of the Vietnam veterans.

It goes without saying that the Supreme Court has not yet passed directly upon the questions of whether or not the *Feres* doctrine was meant to preclude direct and derivative claims of veterans and their wives and children based upon pre-induction negligence, in-service situations where no benefits have been paid, post-discharge negligence and the independent claims of civilian wives and children of the servicemen. As is obvious from the

majority opinion in *United States v. Johnson,* great weight was placed upon the fact that "his wife (Johnson's wife) received and is continuing to receive statutory benefits on account of his death". 107 S. Ct. at 2068, 2069. The Court stated:

> . . . Where a service member is injured incident to service—that is, because of his military relationship with the Government—it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Ibid.* Instead, application of the underlying federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in armed services," *Feres, supra,* at 144 (footnote omitted), is appropriate.
>
> Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres,* the Court observed that the primary purpose of the FTCA "was to extend a remedy to those who had been without; if it incidentally benefitted those already well provided for, it appears to have been unintentional." 340 U.S. at 140.

107 S. Ct. at 2068.

It is undisputed, as noted above, that in this case the Veteran's Administration has rejected all Agent Orange claims by the plaintiffs for benefits. Therefore, the factual basis for the controlling rationale relied upon by the majority in *Johnson* is totally absent in this case.

The other, primary rationale employed by the majority in *Johnson* is the one involving "military discipline and effectiveness". One has only to utilize sheer common sense to recognize that claims for pre-induction negligence and post-discharge negligence, as well as independent claims by civili-

an wives and children, can in no way affect military discipline or effectiveness. See the discussion along these lines by Justice Scalia in the dissent in *Johnson*, 107 S. Ct. at 2073, 2074. We do not understand the majority opinion in *United States v. Stanley* to in anywise contradict the minority opinion in *Johnson*. The question of FTCA coverage was dismissed by this Court in *Stanley* as not having been properly before the Eleventh Circuit, 107 S. Ct. 3059, 3060, and, therefore, this Court did not pass upon the rationale of the Eleventh Circuit, *Stanley v. United States*, 749 F.2d 1530, that post-discharge negligence allegations might constitute "a viable FTCA claim against the United States", despite *Feres*. See discussion *id.*

This Court, in *Stanley*, was deciding whether a veteran had a cause of action for money damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 338 (1971) ("Bivens cause of action"), against certain individuals whom he claimed were responsible for secretly administering LSD to him during his term of service. In holding that *Bivens* did not extend to "incident to service" misconduct, Justice Scalia significantly noted that "if anything we [the Court] might have felt more free to compromise military concerns in the latter context [FTCA suits], since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas we are here confronted with an explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces', U.S. Const. Art. 1, Sec. 8, cl. 14, and rely only upon inference for our own authority to allow money damages." 107 S. Ct. at 3062.

With these comments we now proceed to discuss each of the categories of claims.

A. Suit for pre-induction negligence is not barred by *Feres*.

There are numerous reasons why *Feres* should not operate as a bar to the pre-induction allegations contained in plaintiffs complaint. The first and foremost is that there is no reason consistent with military morale or efficiency why pre-induction military conduct cannot subserve liability. The Government, the district court and the Court of Appeals argued to the contrary, relying on *Healy v. United States*, 192 F.Supp. 325 (S.D.N.Y. 1961), *aff'd* 295 F.2d 958 (2 Cir. 1961) and its progeny. See 603 F. Supp. at 245 and 818 F.2d at p. 200. The problem is that they stretched *Healy* beyond its peculiar facts.

Moreover, contrary to what the lower court held without analysis, none of the three *Feres* rationales are affected by accepting pre-induction claims. It is beyond cavil here that the veterans have no VBA benefits. There is no military discipline involved at the pre-induction stage other than in the pre-induction physical to which *Healy* relates solely, and which is not involved in these cases. And there is nothing "distinctively federal" about product design, military specifications, product manufacture, and the requirement to warn and to warn adequately of hazards. See *Aretz v. United States*, 503 F.Supp. 260 (S.D. Ga. 1977), aff'd 605 F.2d 417 (5th Cir. 1979), reh. granted 616 F.2d 254, reh. 635 F.2d 485, cert'd ques. answered 280 F.2d 345, remanded 660 F.2d 531. Even if there were, that requirement was jettisoned in the cases of *Indian Towing Co. v. United States*, 350 U.S. 61 (1957) and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), as noted in *Healy* itself and discussed in Justice Scalia's dissent in *U.S. v. Johnson*. Moreover, the focus of the plaintiffs' strict liability claims under sec. 402A of the *Restatement 2d of Torts* is on the product, not on the conduct of the United States.

In short, *Feres* does not bar recovery for pre-induction torts or strict liability because: (1) neither *Feres* itself nor its rationales apply and (2) the focus of the inquiry in strict liability is on the product.

B. *Feres* should not be applicable to in-service situations where no benefts have been paid.

As we indicated above, if anything is made clear by the majority opinion in *U.S. v. Johnson,* it is that claims based upon in-service situations must be treated differently where *no* VA benefits are being paid, from those where VA benefits are being paid. As we have stated, this case involves one where it is undisputed that VA benefits are not being paid with respect to the plaintiffs' Agent Orange claims. Against this background of malignant neglect and literally unswerving denial of service-connection by the V.A., the United States, in the district court, trumpeted the assertion that those selfsame veterans' claims were "incident to service" under a *Feres* doctrine which articulates that such injuries should be compensated under a "uniform . . . *certain* compensation system." 340 U.S. at 144. There is no such *"certain"* system here. There is no compensation at all. There is, in short, no "quid" for the "pro quo" which has always been the fundament of the constitutionality of the exclusivity of a compensation system.

The third supposed rationale of *Feres*—military discipline—is discussed in *United States v. Brown,* 348 U.S. 100 (1954). *Brown* held that post-discharge negligent treatment of a service-connected injury in a VA hospital was actionable under the Tort Act, even though the plaintiff had already received added benefits for superimposed malpractice injury under the VBA, because the by-then civilian ex-serviceman was not under military discipline

at the time. By the same token, the injuries of the plaintiffs in this case were not manifested until many years after their service. And, as the district court in this case earlier held, "it is the *degree* of that effect [on discipline] that is important." 580 F.Supp. at 1250-51.

Not only are the *Feres* rationales not met here, but the failure to meet the "certain" compensation system rationale is and should be fatal to the United States' reliance upon *Feres*. We begin with the proposition that the United States will "be liable . . . in the same manner . . . as a private individual" under the FTCA (28 U.S.C. 2674). Next add the fact, as noted above, that these plaintiffs have been denied benefits under the VBA. What plaintiffs seek here is judicial recognition of those denials, not in the sense of res judicata or collateral estoppel, but as a prefix to liability under the FTCA.

The plain truth it that to say administratively that the injuries are not service-connected and to say in court that they are incident to service smacks of inconsistency rather than acceptable alternative pleading. This Court has inherent authority to estop the United States from invoking the *Feres* doctrine, just as the court in *Allen v. United States,* 588 F.Supp. 247, at 345-346 (Utah, C.D., 1984), rev'd 758 F.2d 1384 (10th Cir. 1987), cert. application pending, effectively estopped the United States from asserting the statute of limitations against the radiation claims there involved. Finally, as Justice Scalia observed in *Johnson,* the courts should be especially vigilant to prevent unwarranted extension of *Feres* since the defense is a court-created, not a legislatively-mandated, doctrine.

C. *Feres* cannot bar recovery for the post-discharge torts alleged in this case.

In the veterans' complaint, post-discharge torts are pleaded as a completely separate and alternative cause

of action. That alternative cause of action accepts the repeated assertions of the United States throughout the course of this litigation that during the Vietnam war, the Government did not have knowledge that the Agent Orange used in Vietnam was contaminated with significant amounts of dioxin, and was not aware of the hazards of such dioxin-contaminated herbicide. More specifically, the second cause of action alternatively alleges that the Government *began* to attain such knowledge in late 1969, and that *thereafter* there was a veritable "explosion of knowledge".[5]

In any event, for purposes of this Petition and insofar as the United States' motion to dismiss below is concerned, the allegations of the complaint must be taken as true. *Schuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley v. Gibson,* 355 U.S. 41 (1957); *Molsbergen v. United States,* 757 F.2d 1016 (9th Cir. 1982), at 1918, fn. 2. Thus, for the purposes of the second cause of action, the Court should give effect to the alternative allegations that the Government's information concerning the dangers of Agent Orange did not even *begin* to accrue until late 1969. The issue of exactly when the Government's information grew to the point where it can be said it had *knowledge* of the dangers of Agent Orange and was negligent in failing to warn and monitor, need not be decided

5. That knowledge came from various sources, including the registration proceedings under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) concerning 2,4,5-T, conducted by the U.S. Department of Agriculture and its successor, the EPA, as regulator of herbicide registrations; scientific studies prepared or acquired by EPA; environmental impact statements issued pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. sec. 4321, *et seq.*, in connection with 2,4,5-T spraying in national forests; litigation under FIFRA; and NEPA studies conducted by or in behalf of the VA and other federal and state agencies and departments in connection with Agent Orange legislation, including the Veteran's Health Programs' Extension and Improvement Act of 1979 (Public Law 96-151), and the Veterans Health Care Training and Small Business Loan Act of 1981 (Public Law 97-72).

now; it is enough that under the alternative allegations in the complaint, the Government's knowledge arose *during the post-discharge period.*[6]

Case law has *not* held that *Feres* inflexibly bars all FTCA suits against the United States merely because the claim is linked with an in-service injury. The Supreme Court itself has allowed recovery under the FTCA where negligent acts were committed by the Government after the veteran had left the service. *U.S. v. Brown, supra,* 348 U.S. at 110. Since *Brown,* and both before and after the district court's ruling in the instant case, many cases have recognized a cause of action for the government's negligent post-discharge failure to warn (and/or monitor or treat) a veteran who had been previously injured or exposed to a harmful substance while still in the service. See *Molsbergen v. United States, supra,* 757 F.2d at 1016; *Cole v. United States,* 755 F.2d 873 (11th Cir. 1985); *Broudy v. United States,* 661 F.2d 125 (9th Cir. 1981), after remand, 722 F.2d 566 (9th Cir. 1983); *Shipek v. United States,* 752 F.2d 1352 (9th Cir. 1985); *Kohn v. United States,* 680 F.2d 922, 926 (2nd Cir. 1982); *Taggett v. United States,* 551 F.Supp. 1231 (N.D. Cal. 1982); *Seveney v. United States Government, Dept. of Navy,* 230 F.Supp. 653 (D.C. R.I. 1982); *Schwartz v. United States,* 230 F.Supp. 536 (E.D. Pa. 1964); *Everett v. United States,* 492 F.Supp. 318 (S.D. Ohio 1980);

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6. A summary of the allegations of the second cause of action is instructive. Plaintiffs allege that, after the plaintiffs' respective discharges, the United States owed a special duty to former service-people to *warn* them of the potential hazards to their health of the Agent Orange to which they had been exposed, and to see to it that they *were properly diagnosed, treated and compensated* for illnesses, etc., sustained as a result of their service in Vietnam. It is further alleged that a failure to counsel the veterans and their families regarding genetic and reproductive hazards of herbicides and the failure to test, *after* the fact, the herbicide it *had* used in Vietnam to determine whether it presented any health hazards to former servicemen, was negligence.

Thornwell v. United States, 471 F.Supp. 344 (D.D.C. 1979).

It should be noted that the plaintiffs in *Cole* did not allege that the Government had *no* knowledge of the dangers of radiation until after plaintiffs' discharge, but instead alleged that in the post-discharge period the Government's knowledge *expanded* to the point where there arose a *new* duty to warn of the danger. *Id.* at 875, 876, fn. 4. See also, *Id.* at 878, fn. 14. Moreover, the 11th Circuit distinguished the "continuing tort" theory (which was also cited by the district court in the instant case in favor of dismissal, 603 F.Supp. at 245) from the theory that the Government's expanded knowledge creates a new duty to warn. 755 F.2d at 876-877.[7]

It is clear that the decision of the Court of Appeals below, in holding that Feres bars claims based upon post-discharge negligence, has created severe conflicts among the circuit courts which suggest the intervention of this Court to resolve those conflicts. Certainly such intervention is appropriate when the conflicts involve a case of such profound national importance.

Moreover, as the cases cited above reflect, an analysis of the three *Feres* rationales, as they apply to plaintiffs' post-discharge tort claims, further underscores the conclusion that such claims are not barred. In analyzing these factors it is important to recognize that the post-discharge torts alleged are claims by civilians (former servicepeople) who challenge the Government (primarily non-military departments) for failure to act (failure to warn, counsel, diagnose, treat, monitor, etc.) in the *period after dis-*

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7. See also the academic literature discussing the cases and supporting the viability of post-discharge torts under *Feres*; e.g., Judicial Recovery for the Post-Service Tort: A Veteran's Last Battle, 14 Pac.L.J. 333 (1983); Duty to Warn as an Inroad to the *Feres* Doctrine: A Theory of Tort Recovery for the Veteran, 43 Oh.St. L.J. 267 (1982).

charge, based on *knowledge gained after discharge,* and who seek compensation *not* for the *exposure* to Agent Orange, but for the manifestation and aggravation of their injuries and the inability to ameliorate them due to the lack of a timely warning and treatment once the dangers and risks of Agent Orange exposure had been learned by the United States.

D. *Feres* does not bar independent claims of wives and children of Vietnam veterans.

Judge Weinstein, in *In re Agent Orange Product Liability Litigation,* 580 F.Supp. 1242 (E.D. N.Y. 1984), stated the issue with respect to the wives and children succinctly:

> The wives' contentions are that their husbands' exposure to Agent Orange damaged their husbands' sperm causing them to miscarry. The children claim that genetic damage to their fathers caused their own birth defects.

580 F.Supp. at 1247. As with the pre-induction negligence claims, the in-service claims where the VBA has denied benefits and the post-discharge negligence claims, this Court has never expressly addressed the issues with regard to the independent claims of wives and children.

As to the three rationales given to justify *Feres,* Judge Weinstein, whose first decision on the subject we take the rare step of adopting, 580 F Supp. at 1250, et seq., had this to say about those rationales in the context of the claims of the wives and children: (1) The rationale of a "uniform, comprehensive, no-fault compensation scheme", *Feres,* 340 U.S. at 145, "does not apply to the independent claims of the wives and children" because "that group will not be compensated by the Veterans Benefit Act for their own injuries" and allowing their suit would fulfill

"the primary purpose of the (FTCA), [viz] to extend a remedy to those who had been without (a remedy). *Feres,* 340 U.S. at 140". 580 F.Supp. at 1250. (2) Suits by civilians alleging military negligence have been permitted "without even discussing the effects of the suit on military discipline". 580 F.Supp. at 1250, citing *Bridgford v. United States,* 550 F.2d 978 (4th Cir. 1977); *Williams v. United States,* 435 F.2d 804 (1st Cir. 1970); *Arrendale v. United States,* 469 F.Supp. 883 (N.D. Tex. 1979); *Steele v. United States,* 463 F.Supp. 321 (D. Alaska 1978). *See generally,* Note, The Effect of the *Feres* Doctrine on Tort Actions Against the United States by Family Members of Servicemen, 50 Fordham L. Rev. 1241, 1244 (1982). As Judge Weinstein stated:

> The fact that an officer might refrain from giving an order to the soldier because a civilian might ultimately sue the United States is so ephemeral and far-fetched that it is given no weight at all in determining the limits of *Feres.* . . . There is another reason why the military discipline argument seems tenuous here. We are called on to decide claims that arise out of military orders given some twenty years ago. . . . *Lombard v. United States,* 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., dissenting).

580 F.Supp. at 1250, 1253; (3) With regard to the third rationale, based upon the "distinctively federal . . . character" of the relationship between the servicemen and the government, *Feres,* 340 U.S. at 143, the relationship of the wives and children's independent claims with the federal government is not "distinctively federal in character", 580 F.Supp. at 1254, and, as Judge Weinstein pointed out, "the [district] court has concluded that on many substantive issues one law will apply to all claims" and, therefore, the "fortuity of the place of injury will . . . not affect their recovery". *id.* at 1254.

The Court of Appeals, in concluding that *Feres* barred the independent claims of the wives and children, *Adams,* 818 F.2d at 202-204, has once again generated a conflict with other courts of appeals and has unreasonably extended the court-crafted *Feres* doctrine into mortal conflict with the intent of Congress when it adopted the FTCA.

As we noted above, Justice Scalia suggested that if *Feres* is not going to be overturned, it certainly should not be extended any further. 107 S. Ct. 2070, 2075. What Justice Scalia had to say is consistent with the attitude of the Supreme Court previously expressed in *United States v. Yellow Cab Co.,* 340 U.S. 543, 554 (1951):

> We think that the congressional attitude in passing the Tort Claims Act is . . . accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Co.,* 243 N.Y. 140, 147, 153 N.E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."

In sum, we submit that the Supreme Court should no longer remain silent on these issues—pre-induction negligence, in-service negligence where the plaintiffs have had no compensation relief, post-discharge negligence,[8] and the independent claims of wives and children in the context of this case—particularly in view of the importance

8. We do not wish to imply that *U.S. v. Brown* does not possibly constitute a dispositive precedent with regard to post-discharge negligence. Justice Scalia, in *Stanley,* seems to imply that it might be just that kind of precedent. 107 S. Ct. 3058, 3059. (Where *Brown* was cited in reference to the plaintiffs' post-discharge negligence claims). But Justice Scalia also noted that "no holding is broader than the facts before the court", *id.* at 3062, and we, therefore, simply say that *Brown* at least provides analogous precedent with regard to post-discharge negligence.

of those issues to the body of law involving the FTCA. Moreover, in view of the expressions of doubt about the continued validity of the *Feres* doctrine; the skepticism about any further extension of it; the direct and inferred conflicts among many of the courts of appeals' decisions on these very issues; and the overriding national importance of *this* case, we suggest that this is a compelling case for certiorari intervention by this Court.

IV. The Court of Appeals Erred In Sweeping Away The Plaintiffs' Claims Against The United States Government Under the "Discretionary Function Exception".

The most recent pronouncement by the Supreme Court concerning the discretionary function exception to the FTCA is *United States v. S.A. Empresa De Vicio Area Rio Grandense (Varig Airlines)*, 467 U.S. 797, 81 L.Ed. 2d 660 (1984) (hereinafter referred to as the "*Varig* decision"). In that case, the Court held that the discretionary function exception to the FTCA extends to the discretionary acts of the government acting in its role as a regulator of private individuals. In this case, there is absolutely no contention against the United States Government that it was negligent in performing discretionary acts while acting in its role as a *regulator* of private individuals. Thus, *Varig* does not apply to this case.

As we indicated in our Preliminary Statement, plaintiffs in this case did *not* allege negligence in connection with the decision of the military to use Agent Orange in Vietnam to defoliate the jungles. That decision could very well have been a discretionary function. The negligence and product defects which we allege to have occurred relate not to the making of that decision but solely to the manner in which that decision was carried out.

This case is closely analogous to the case of *Indian Towing Company v. United States,* 350 U.S. 61 (1955). This Court in *Indian Towing,* after considerable discussion, concluded as follows:

> The Coast Guard need not undertake the lighthouse service. *But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order;* and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. *If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.*

350 U.S. at 69; emphasis ours.

In this case, as we stated above, we do not question the decision of the United States to utilize Agent Orange in Vietnam for the purpose of defoliating the jungle. Whether that decision was right or wrong; whether it was negligently made or not; whether it was properly made or not do not constitute the basis of our allegations and do not form any part of our cause of action. What we do allege is that once the decision was made to use Agent Orange, as the decision was made by the Coast Guard in *Indian Towing* to "undertake the lighthouse service", the United States had the continuing duty to carry out that decision prudently. It had the duty not to use defective or contaminated products. It most certainly had the duty to warn the servicemen of the dangers of Agent Orange. It had the duty to provide prophylatic and other protective gear that was state of the art in order to eliminate or reduce the hazards of exposure. It had the duty to medically monitor the servicemen with

respect to their exposure. It had the duty to give pre-induction warnings and exercise prudence with regard to pre-induction matters. It had the duty, on a post-discharge basis, to warn the plaintiffs of the dangers of Agent Orange, medically monitor the plaintiffs, and provide medical care and aid to them. It had the duty to warn, counsel and medically monitor the wives concerning pregnancy and potential genetic damage to their husbands. In short, the acts of commission and omission and product defects which plaintiffs have asserted in this case are precisely analogous to those which this Court has said in *Indian Towing* do not come within the umbrella of the discretionary function exception.

Another observation should be added to our discussion of the discretionary function exception. As Judge Weinstein observed, the record before the district court did not contain a complete and conclusory negation of all possible and potential fact issues with regard to that exception. Judge Weinstein noted:

> The record is not sufficiently developed at this point to enable the court to conclude whether the government's decisions come within the discretionary function exemption. It is not clear who made the relevant decisions or what those decisions were. It would therefore be improper to grant summary judgment.

580 F.Supp. at 1255-1256. The foregoing is consistent with the general observations of this Court in *Adickes v. Kress,* 398 U.S. 260 (1970), concerning fact issues. We do not understand why the Court of Appeals was so extravagant in its assumption of facts which either were obviously in dispute or which had not been conclusively negated by the Government.

It is in the interest of justice for this Court to grant certiorari because of the urgent need to maintain uniformity of decisions and for judicial clarification of the

discretionary function exception and its application to a case such as this one.[9]

CONCLUSION AND PRAYER

Justice O'Conner, in her dissent in *U.S. v. Stanley*, stated that "[n]o judicially crafted rule should insulate from liability . . . involuntary and unknowing human experimentation". 107 S. Ct. at 3065. Much reference has been made of the use of Agent Orange as a tool of chemical warfare (destroying food crops as well as exposing human beings, including our own soldiers, to highly toxic chemicals) in possible violation of treaties as old as the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 589 (Hague Convention), Art. 23(a). In all candor, we did not raise the constitutional tort issues, even though they were pled in the district court, in our appeal in the Second Circuit and, therefore, we cannot raise them now. However, we mention the specter of chemical warfare because of its serious implications—to our soldiers, to all people everywhere and to the

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9. Although they had nothing to do with the decision of the Court of Appeals in this case, Judge Weinstein, in one of his many reversals of opinion (compare 603 F.Supp. 239 with 580 F.Supp. 1242) did mention in 603 F.Supp. two other exceptions to the FTCA, the combatant activities exception, Sec. 2680(y), and the foreign country exception, 28 U.S.C. 2680(k), as being possible grounds for denial of FTCA coverage. However, as he earlier explained, these two exceptions simply do not apply; the combatant activities exception does not apply because it only involves actually engaging the enemy in the exercise of physical force and violence; the foreign country exception is not applicable because it was designed to ensure that "the United States (is not subject) to liabilities dependent upon the laws of a foreign power"; only United States law has been held to apply in the Agent Orange case, *In re Agent Orange Products Liability Litigation*, P.T.O. 92, 580 F.Supp. 690, 707 (E.D. N.Y. 1984); moreover, the foreign country exception applies only to acts or omissions occurring in the foreign country, not to those arising in the United States. 580 F.Supp. at 1254-1255 and the authorities therein cited.

survival of our planet—and because, though it may not be a direct issue before this Court, it surely enhances the importance to this nation of a consideration by this Court of the direct issues which *are* here presented.

In the final analysis, it is our brave soldiers who are our primary concern in this litigation and it is a national tragedy that a federal judge has thrust upon them a settlement they did not want; our Government has not only denied liability but has skillfully distorted the causation issue by using tax dollars to finance epidemiological studies not based upon sound epidemiological principles (such as the Ranch Hand study conducted by the Air Force);[10] our Veteran's Administration has callously turned its back on their claims; and the Congress has done no more than give lip-service—but no benefits—to solve this nation's nagging Agent Orange problem.

As Justice Brennan stated in *Stanley,* 107 S. Ct. at 3077, "[s]oldiers ought not be asked to defend a Constitution indifferent to their essential human dignity."

Plaintiffs pray the Court to grant certiorari in this case.

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10. The Ranch Hand Study involved an analysis *only* of the Air Force personnel who did the spraying, went back to base every night, bathed, slept clean, drank clean water and ate clean food. It did not involve the soldiers who fought on the ground, had Agent Orange sprayed *on* them, traveled through heavily sprayed brush, ate food and drank water contaminated with it and slept in clothes soaked in it. Yet, the Air Force had the audacity to claim the Study constituted proof of no causation with respect to the ground troops.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 1987, true and correct copies of the above and foregoing Petition for Writ of Certiorari were sent to all counsel of record.

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

THOMAS ADAMS; TEREAS ADAMS; JOHN L. ANDERSON; RITA ANDERSON; BILL ANGILAN; DANIEL ANQUETIL; PATTY ANQUETIL; ANGELO ANTINORO, JR., RONALD L. ANTRIM; JAMES H. APPLING; RAY R. ARAGON; SHERRILL C. ARMAND; MRS. SHERILL C. ARMAND, MRS. MARK L. ARNOLD; JOSE ARROYO; MRS. JOSE ARROYO; WILLIAM B. ASKEW; JOANN ASKEW; JOSEPH L. AUYER; MRS. JOSEPH L. AUYER; WILLIAM BALDERAS; MRS. WILLIAM BALDERAS; MRS. STELLA BALDERAS; EDWARD F. BELICE, JR.; MRS. MAMIE L. BERRY; EUGENE BERRY JR.; JAN M. BEST; JAMES A. BIEGGER; JOHN M. BIGGS; KENNETH J. BIHLER; EVERETT P. BRYCE; CONNIE MITCHELL; NOAH W. MONK; THOMAS G. MONTAGUE; INEZ I. MONTES; MRS. ESTELLO MONTES; RUBEN MONTES; MRS. DELIA MONTES; MICHAEL E. MONTGOMERY; ANDREW L. MOOTHART; LEANNA MOOTHART; NANCY MORIARTY; EDWARD J. MORIARTY, JR; PAUL R. MOREN; DALE L. MORIN; JAMES W. MORRIS; VINCENT R. MOSES; EUGENE C. MOSHER; BOB MOSIER; MRS. CAROLIN MOSIER; SAM MOSS; ROBERT F. MULFORD; YVONNE MULFORD; LORENZO T. ANTHONY H. MUNRO; PATRIC J. MURPHY; RODGER MURRAY; MRS. BIRTHA MURRAY; TIMOTHY A. HOBERT W. NELSON; ALBERT NERIA; BONITA NERIA; ROBERT NEWCOMBE; GEORGE M. NEWMAN; RICHARD BUIE; MRS. CATHY BUIE; TRUMAN E. BULLARD; DICKEY BYRD; LANDRY CALLEGIN; ZANE H. CASSELL; ROBERT CASTAGNA; DONALD G. CHESSMAN; LEDON CARLTON R. CHRISTENSEN; ROBERT	§	C.A.-1-85-6065

CLEMENTS; RANDY B. COATES; JOSEPH F. CONNOLLY, II; MALCOLM COX; JAMES V. DALE; RAYMOND F. DALY; JIMMY G. DANIEL; HERBERT L. DAWSON; CLIFFORD R. DAY; RICHARD DECK; MRS. DONNA DELONEY; JAMES A. DELONEY; ALBERT DESPER; JACOB W. DEWOLF; MRS. DEBRA DEWOLF; ROBERT E. DOUCETTE; RANDOLPH DUDLEY; ROBERT M. DUNN; MRS. JANICE DUNN; MELVIN A. ELLIS; MRS. MELVIN A. ELLIS; JOHN ELWIN; DELBERT G. FELDMAN; BARBARA J. FELDMAN; RICHARD FIEDERLEIN; ELAIN FIEDERLEIN; GARY W. FISHER; WAYNE W. FORD; MARGARET FORD; ROBERT J. FRAY; M. K. FRESBIE; MRS. MATTIE J. GALLUP; ROBERT GALLUP; ERNEST GANDY; MRS. ERNEST GANDY; ROJELIO GARCIA; JOE S. GIBBONS; DAVID M. GODFREY; KATHLEEN GOMES; JOHN GOMES, JR.; RICHARD B. GONZALEZ; NYDIA GONZALEZ; WILLIE B. NEWSON; ELLIS E. NICHOLAS, JR.; JANET F. NICHOLS; MRS. JOSEPH G. NICHOLS; ELLIS E. NICHOLS; ELLIS E. NICHOLS, JR.; LARRY D. NICHOLSON; STANLEY C. NICHOLSON; MRS. STANLEY C. NICHOLSON; BETTY M. NICHOLSON; TERRY M. NOAH; MRS. TERRY M. NOAH; DANIEL D. NUTTER; KAREN NUTTER; MARTIN J. NUYIANES; THOMAS A. O'HEARN; FREDERICK OLDORFF; MRS. KIMI OLDORFF; JAMES O'NEAL; JAMES E. OUTLER; JOHN C. OWEN; MRS. ALVA R. OXYER; EDWARD W. OXYER; DONATA PALUMBO; MRS. THOMAS R. PARKER; THOMAS M. PARKER; ROBERT L. PARNELL; PETER F. PASQUALE; GENE W. PATZER; MICHAEL K. PAULEY; HENRY L. PAYNE; EARL L. PAYNE; MRS. PATTI PAYNE; WILLIAM E. PEARCH; BUDENA PEARCH; JEFFREY PERLA; MRS. CHERYL J. PICARD; LOUIS R. PICARD; MRS. KATY L. PICKETT; LAWRENCE T. PICKETT; THOMAS J. PIZZUTO; MRS. ANN PIZZUTO; JAMES M. PLEICONES; MRS. BETTY B. PLEICONES; GUY A. PLOTT; ERNEST PONTI; KENNETH B. §

§ C.A. 1-85-6065

POOLE; ROBERT S. POPE, JR.; MRS. EVELYN POPE, JR.; MARK A. POWERS; JOHN H. PRICE; WILLIAM E. GREENE; DOUGLAS W. GREGORY; MARY GREGORY; RICKY R. GRESHAM; RICHARD E. HAEHL; ROGER R. HAGWOOD; WADE HARDIN; MRS. JOYCE I. HEWITT; PERCELL E. HEYWARD; WILLIE A. HICKS; JUDY J. HIGGINS; HARRY J. HILEWITZ; DENNIS G. HOBACK; STEVEN D. HOLLOWAY; JAMES M. HOLMES; JOHN J. HOMICKI; JOHN L. HOOVER; GORDON R. HORNE; SHIRLEY R. HOUSE; MARY HOUSE; KEVIN J. HOWARD; RONALD J. HOWELL; MAUREEN HOWELL; THEODURE J. HRONES; DONALD J. HUBERT; TERRY HUCKABY; PEGGE J. HUCKABY; CLAUDE HYATT; DIANE HYER; CLARENCE I. HYER, JR.; GEORGE T. IMES; JAMES R. JAHNZ; RICHARD JAMES; JAMES A. JANKO; ALBERT H. JARRY; PATRICIA M. JARRY; L. W. JOHNSON; MRS. SHON JOHNSON; STEPHEN B. JONES; LEE F. JONES; MRS. JOAN I. JONES; DAN JORDAN; MRS. DONNA JORDAN; ESSIC J. JORDAN; ROBERT L. JORDAN; FRED KAMMERZELL; MRS. FRED KAMMERZELL; ROBERT F. KANE: MRS. COLLEEN KANE; JAMES KANE; JOHN L. PRICE; RICHARD J. PROFERA; MRS. CATHY PROFERA; DANIEL A. PYNN; RUTH PYNN; ELMER R. RADFORD; MRS. SANDRA K. REARDON; EDMUND R. REARDON, JR.; MERLE REDCAY; ERROL L. REDDOCK; RICHARD REID; MICHAEL REILLY; ROBERT R. RETZ; MRS. JUDITH RETZ; FREDDIE RHAMES; PAUL M. RICHARDS; ALFRED F. RICK; MRS. PAULA RICK; DENNIS N. RICKLEY; WILLIAM R. RIDNER; MRS. SHARON RIDNER; MARK R. RIENZIE; VIRGINIA E. RIGGS; THOMAS RILEY; ANGELO J. RITA; LAWRENCE F. RITCHIE; MRS. HELGA RITCHIE; ARTHUR C. RITTER; PAMELA J. ROBACK; RICHARD J. ROBACK; JAMES D. ROBBINS; MRS. DARNELLE ROBINS; STEPHEN S. ROBBINS; ONNIE B. ROBINSON; ROY A. RODRIQUEZ; RICHARD R. ROGERS; NA-

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POLEON ROWELL; CRESCENCIO SANCHEZ; EDDIE C. SANDEFER; FRED K. SAUPE; HERMAN R. SCHINDLER; MRS. KAREN L. SCHINDLER; MRS. BARBARA SCHNEIDER; MICHAEL A SCHNEIDER; ROBERT H. SEIFERHELD; BETTY SEXTON; LARRY G. SHALUER; ANDREW KEENE; F. M. KENDALL; JAMES M. KURILKO; BRUCE R. LANG; EDWARD G. LAWIDA; HAROLD J. LEDFORD; JAMES H. LENT; LINDA J. LENT; GARY P. LEONARDELLI; LYNN LEONARDELLI; DONALD LEWIS; DALE R. LEWIS, JR.; THOMAS M. LINDSAY; ADRIAN L. LINKER; WILLIAM B. LIPSCOMB; JOHN L. LOVE; GERALD LOVEDAY; DONNA L. LOVEDAY; MELVIN K. LOVELACE; MRS. EVELYN K. LOVELACE; ROBERT S. LUCIANO; PATRICIA LUCIANO; ROBERT B. LUFT; CAROL A. LUFT; KAREN A. LUSCAN; JOSEPH T. LUSCAN, JR.; VERNON E. LYTLE; JOE MACLAREN; PETER W. MADLEM; WILLIAM P. MAGNESS; RICHARD MANDRIOTA; LOUIS E. MANOGUE; MRS. TERRY H. MANOQUE; MARIE MARCHIONE; KENNETH D. MARCUM; MRS. JEANINE L. MARCUM; MRS. GLORIA MARTIN; FEDERICO MARTINEZ; MRS. NOEMI MARTINEZ; STEVEN W. MAXSON; TIMOTHY D. McCALL; RICHARD F. McHUGH; EDWIN J. McINTYRE; MRS. ELOIS McKINNEY; HASKEL R. McKINNEY; BENJAMIN K. McKINNEY; ROXANE McKINNEY; PATRICK D. McMAMUS; WARREN D. McPHERSON; MICHAEL E. McQUILKIN; DENNIS M. SHARKEY; MRS. DENNIS M. SHARKEY; DENNIS M. SHARKEY; LEONARD G. SHEFLOTT; LEONARD E. SHEPARD; MRS. LEONARD E. SHEPARD; MICHAEL L. SHERMAN; MRS. SONDRA SHOURD; GERALD SHOURD; WILBER E. SINGLETON; RICHARD J. SKINNER; JACQUELINE C. SMITH; STANLEY G. SMITH; GARY J. SMITH; RONALD SMITH; JOE SMITH; MRS. KATHERINE E. SPENCER; THOMAS W. SPENCER, JR.; MRS. ELLEN SPINELLI; RONALD SPINELLI; MRS. MARY E.

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STALEY; LESLIE J. STALEY; JERRY L. §
STALMACH; RAYMOND N. STANCIL; STE- §
PHEN STREET; WALTER A. SWENSEN; §
CHESTER L. TALBERT; MRS. BRENDA §
TALBERT; DAVID A. TAYLOR; RICHARD §
D. TAYLOR; LESTER K. TAYLOR; JANET §
L. THOMPSON; JOHN R. THORNE; CELIA §
TIDMORE; LELAND TIDMORE; JIMMIE §
D. TRIPLETT; JAMES TURNER; DAVID E. §
TWEDEN; PATRICK VASSALLO; TERESA §
J. VAUDA; GREGORY F. VAYDA; JAMES T. §
VILLA; KARSTEN B. VOLLSTEDT; LINDA §
WAGENMAKER; AARON S. WAGENMAK- §
ER; LARNZO WALKER; BILLY R. WEIS- §
SEND; MRS. ANN M. WHITE; WILLIAM §
G. WHITE; MRS. PEGGY A. WIEBOLD; §
ROGER L. WIEBOLD; GREGORY MEADE; §
TIM A. MEHL; SYLVIA M. MEHL; ROBERT § C.A.-1-85-6065
MEYERS, JR.; JOHN A. MEZZANOTTE; §
MRS. BRENDA MEZZANOTTE; ARLO W. §
MICHEL; STEPHEN A. MICSAK; DONALD §
MILLEDGE; JEFFREY MILLER; VICKI L. §
MILLER; MICHAEL W. EDWARD A. MIL- §
LER; MADELIN MILLER; ODELL R. MIL- §
STEAD; LEONARD H. MINOR; CHARLES §
D. MITCHELL; MRS. FLORENCE WIGGINS; §
JAMES WIGGINS; KENNETH D. WIL- §
LIAMS; MRS. LINDA L. WILLIAMS; JA- §
COB WILLIAMS; JARRETT D. WILLIAMS; §
MRS. CAROLYN A. WILLIAMS; KENNETH §
C. WILSON; BARBARA WOLFE; HENRY §
WOOLRIDGE; RICHARD O. WYANT; PAU- §
LINE C. WYANT; LLOYD H. YARBROUGH; §
ABEENE, JERRY E; ABEENE, JERRY E. §
MRS.; ACKERMAN, RAYMOND; ACOSTA, §
LEONARD; ANNABLE, ARNOLD, GUY L.; §
LAKEY, HULON E.; MASTALSKI, JOHN J.; §
MCCOY, THOMAS C.; MCINTYRE, LARRY; §
MCKENNEY, JESSIE; MCKENNEY, SAM, §
JR.; MCKIBBEN, CHARLES W.; MICHEL, §
CARL F.; MITCHELL, ARTHUR; MURPHY, §
EUGENE; ALDERMAN, JOE C.; ALDER- §
MAN, JOEL P.; ALDERMAN, LINDA I.; §
ALEXANDER, JOHN D.; ALEXANDER, SU- §
SAN O.; ALICES, HARRY; ALLEN, LEON K.; §
ALLEY, DONALD W.; ARNOLD, RONALD §
L.; BACINA, JEANNETTE M.; BALAS, DON- §

ALD W.; BALL, C.; BALL, JOHN J.; BALUKOFF, JEANINE; BALUKOFF, LOUIS; BARAZ, LINDA; BARAZ, RODNEY H.; BARRETT, GEORGE A.; BARRETT, GEORGE A. MRS.; BARRON, DALTON E. L.; BARTON, WALLACE O.; BASS, BASS, ANGELA; BASS, DALE M.; BASS, JERRY W.; BAUER, EVELYN; BURCHETT, GRAY R. MRS.; BURKE, BARRY J.; BURKETT, RICHARD L.; BURTON, HENRY D.; BURTON, LINDA; BURTON, RONALD V.; BUSHINGER, GARY J.; BYRD, DICKEY; BYRD, WINNIE; CAFFERTY, THOMAS S.; CALLANDER, JOHN; CALLANDER, JOHN MRS.; CAMPBELL, HARRISON; CAMPBELL, MILDRED; CAMPBELL, RICHARD L.; CAMPBELL, RICHARD L.; CAMPBELL, RICHARD L., MRS.; CANADY, DAVID; CANADY, JAMES A.; CAPARELLI, HAROLD; CAPERS, CYNTHIA; CAPERS, WILLARD; CARDARELLA, GEORGE D.; CARNEY, JAMES T.; CARR, FRANCIS J., JR.; CARROLL, DAVID E.; CARTER, ALLEN J.; CARTER, DEBORAH; CARTER, JAMES A.; CARTER, LAINA S.; CARTWRIGHT, MARSHELLE; CARVAJAL, ARTHUR L.; CARVAJAL, PHYLLIS; CASE, DON M.; CASSELL, ZANE H.; CASSELL, ZANE H. MRS.; CASTAGNA, KATHLEEN; CASTAGNA, ROBERT; CASTELLO, RICHARD A.; CASTILLO, GEORGE E.; CECIL, DEBORAH; CECIL, SAMUEL W.; CESSNA, MICHAEL J.; CHADWICK, CONNIE; CHADWICK, JOHN L.; CHALKER, WAYNE C.; CHASKIN, ARTHUR; CHASKIN, JEANNE; CHEESMAN, AMY L.; CHEESMAN, DONALD G.; CHEESMAN, DONALD G. MRS.; CHEESMAN, DONALD J.; CHEEVES, HORACE; CHEVANNES, LIDON D.; CHIODI, DIANE; CHIODI, JOHN M.; CHISOLM, JOHN B.; CHISOLM, ROZELLIN; CHIVERS, GWENDOLYN; CHIVERS, RICHARD D.; CHRISTENSEN, CARLTON R.; CHRISTEENSEN, GLORIA; CICCARELLI, BARBARA, CICCARELLI, CIRO N.; CICCARELLI, DONALD; CINGLIE, JOAN, CLARE, T.K.; CLARK, GEORGE F.; CLARK, GEORGE F. MRS.; CLARKE, §

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LYNN; CLAY, DAVID L.; CLEMENTS, §
ROBERT N.; CLEMONS, MICHAEL G.; §
CLOVERS, RICK A.; COCKFIELD, ISAAC §
R. JR.; COLVIN, ALEX JR.; CONNALLY, §
JOSEPH F., II; CONNER, ERNEST, CON- §
NOLLY; CONNOLLY, CHRISTINE; CON- §
NOLLY, LAWRENCE S.; CONNOR, WAYNE §
C.; CONRAD, EDWIN A. JR.; COOK, DON- §
ALD B.; COOK, FRANK C.; COOK, KIM- §
BERLY; COOK, RONALD G.; COOK, SHAR- §
ON; COOPER, ALAN H.; COOPER DEBOR- §
AH, COOPER, TOMMY L.; COPPOLA, §
GEORGE L.; COPPOLA, GEORGE MRS.; §
CORBETT, HAYES F.; CORBIN, JAMES F.; §
CORNELIUS, NEIL; CORTEZ, CARLOS; §
COUSINS, BRACE E.; COUSINS, KAREN, §
COUSINS, COX, WILLIAM W.; CRAFT, §
CAROLYN; CRAFT, RICHARD A.; CRAIG, § C.A.-1-85-6065
MICHAEL J.; CRAWFORD, ALICE; CRIS- §
TOFARO, NESA A.; CRISTOFARO, RODNEY; §
CRISWELL, DAVID; CRISWELL, LINDA; §
CROSSLAND, DARRELL; CROSSLAND, JAY- §
ANNA; CROWL, BETTY J.; CROWL, JOHN §
W. III; CROWL, JOHN W. JR.; CROWLEY, §
JAMES F.; CRUMMEL, SHERI; CRUMP, §
WILLIAM J.; CRUSAN, CHARLES B.; CUM- §
MINGS, WILLIE R.; CURTIS, CHARLES C.; §
CURTIS, JAN L.; DALLER, DORIS H.; DAL- §
LER, RAYMOND O.; DALY, DEBORAH; §
DALY, RAYMOND E.; DANIEL, JIMMY G.; §
DANIEL, LYNN; DARE, DORIS; DARE, §
RICHARD E.; DASH, HOWARD S.; DASH, §
MRS.; DAVIDSON, CHARLES; DAVIDSON, §
MRS.; DAVIS, GAYE; DAVIS, GERALD K.; §
DAWSON, ALBERT L.; DAWSON, EVELYN §
M.; DAWSON, HERBERT L.; DAWSON, §
JANET F.; DEACY, JOHN J.; DEAN, MARIE; §
DEAN, STEPHEN; DECKER, THEODORE; §
DEFREITAS, FRANCIS J. JR.; DEFREITAS, §
GAIL; DEKOFF, ARTHUR D.; DEKOFF, §
THELMA R.; DELDON, ANTHONY M.; §
DELDON, ANTHONY M. MRS.; DELLING- §
ER, CHARLES; DEMERLE, RICHARD; DE- §
SANDO, MICHAEL; DESANDO, MONA C.; §
DEVASTO, RONALD P.; DEVAUGHN, AL- §
FRED; DEVAUGHN, SUSIE B.; DILLARD, §
GEORGE; DILLARD, G. MRS.; DINGLE, §

JAMES; DISHAW, ANN C.; DISHAW, JAMES P.; DIXON, DENNIS L.; DIXON, MRS.; DLUBAC, PAUL J. III, MRS.; DOERING, JOAN; DONALD, ROBERT C.; DOOLEY, HOWARD JR.; DORWART, ROBERT; DORWART, SUSAN; DOSSAT, BEATRICE; DOSSAT, RUSS L.; DOUCETTE, MILDRED; DOUCETTE, ROBERT; DOUGLAS, DANA A.; DOWNING, JAMES D. MRS.; DRONEY, RICHARD T.; DUDLEY, DAVID L.; DUDLEY, MRS.; DUDLEY, RANDOLPH; DUDLEY, SUSAN; DUFFNEY, MRS.; DUFFNEY, THOMAS; DUNCAN, BILLY C.; DUNCAN, ROBERT; DUNCAN, WANDA; DUPREE, ROBERT; DUPREE, TONI W.; DURBIN, DIANA; DURBIN, MELVIN R.; EASTERBOOK, CURTIS D.; EASTERBOOK, MRS.; EDWARDS, CHARLES N.; EDWARDS, MRS.; EDWARDS, WEBSTER M.; ELLIS, KATHLEEN J.; ELLIS, RICHARD E.; EMERY, JEFFREY R.; ERNST, ROBERT L.; ESTER, ROBERT L.; ESTER, HAROLD F.; ESTER, MRS.; ESTESS, CHRISTINE P.; ESTEES, RUDOLPH H.; EVARTS, MARY E.; EVARTS, ROBERT D.; FARRELL, JAMES E.; FARRELL, JAMES E. MRS.; FAULKNER, CAROL L.; FAUTH, DONALD W.; FAUTH, LINDA S.; FEARS, ALFRED R.; FEARS, SHARON; FERGUSON, VEARL; FRELUS, KATHLEEN L.; FERLUS, NICHOLAS G.; FERRICK, FRIEDA L.; FERRICK, JOHN P.; FITZGERALD, DAVID J.; FOOTER, JOSEPH A.; FOOTER, MARIE; FORT, WILLIAM T.; FOSTER, BRUCE; FOSTER, MARIE; FOWLES, LEE A.; FOWLES, STEVEN L.; FOX, JAMES M.; FOYE, JOHN L.; FOYE, MARY R.; FRANOVICH, LEO; FULTZ, RAYMOND D.; GADINO, ANTHONY; GALLAGHER, JAMES P.; GANDENBERGER, GEORGE F. III; GANDENBERGER, MRS.; GARLING, STEVE H.; GARLING, VICENTA; GATES, EUGENE; GAUDIOSO, MRS.; GAUDIOSO, PHILIP R.; GEE, CHARLES R.; GELLER, IRA A.; GELLER, MRS.; GIBBS, ESSIE M.; GIBBS, MICHAEL C.; GIBSON, MRS.; GIFFORD, DEBRA; GIFFORD, JAMES P.; GINSA, LEO L.; GOBIN, CLARENCE H. JR.;

§ C.A.-1-85-6065

GOBIN, MICHELLE; GODFREY, DAVID M.; GODFREY, MRS.; GOLDMAN, DAVID M.; GOMEZ, JOSE J. JR.; GONZALEZ, CARLOS; GONZALEZ, FERDINAND; GORDY, GARY G.; GORZOCH, MRS.; GORZOCH, THOMAS; GOULET, GARRETT A.; GRABBIE, THOMAS E.; GRADY, PAUL L.; GRAHAM, DONALD E.; GRAHAM, SHARON C.; GRAVELIN, PATRICK; GRAY, WILLIM D.; GRAYSON, ALLEN K.; GRAYSON, NANCY; GREEN, ROBERT W.; GREEN, SUSAN, N.; GREEN, WILLIE B.; GREENE, DAVID; GREENE, DAVID, MRS.; GREGORY, FLOYD E.; GREGORY, KATHY P.; GRENIER, ELIZABETH; GRENIER, PAUL W.; GREY, JAMES; GUBITOSI, MICHAEL A.; GULLEY, OSCAR G. III; GULLO, GERALD R.; GUNDERSON, RICHARD G.; GUNSON, KATHLEEN; GUNSON, KATHLEEN S.; GUTH, RICHARD F. JR.; GUTIERREZ, ARTHUR J.; GUTKOWSKI, RICHARD; GUTTERREZ; RITA; HAEHL, MARY S.; HAEHL, RICHARD E.; HAGWOOD, ROGER R.; HAJEK, HAREN; HAJEK, JAMES; HALE, JUDI; HALE, KEITH R.; HALL, MICHAEL; HALLETT, ROBERT C.; HALSTEAD, DANIEL L.; HALSTEAD, SARAH T.; HAMMOND, LAWRENCE A.; HAMMON, LINDA; HANCHARICK, JOSEPH JR.; HANKINS, JAMES N.; HARDEN, ELBERT E.; HARDEN, NANCY; HARDIN, DEBRA JA; HARDIN, LAWRENCE W.; HARDIN, TINA L.; HARDIN, WADE; HARMON, CHARLES E.; HARMON, JOHN; HARMON, LE T.; HARPER, CHARLES M. III; HARPER, FRANK A.; HARPER, JILL; HARPER, JUANA V.; HARRIS, JOHN C.; HART, RICHARD N.; HARTUNG, ALAN B.; HARTUNG, LYNN; HARVEY, ERVIN E.; HASSELL, DANIEL L. JR.; HASSERT, ROBERT W.; HASSLER, ROBERT A.; HAUCK, DAVID R.; HAVENS, LAWRENCE P.; HAVENS, VICKI; HAVICE, ANN M.; HAVICE, BLAINE L. JR.; HAYES, DAVID; HAYES, DON E.; HAYES, DONITA R.; HAYES, MICHELLE L.; HECTOR, GLORIA; HEDGESPETH, LAWRENCE; HEIDEL, LARRY G.; HELWIG, CAROL C.; HEL-

§ C.A.-1-85-6065

WIG, CHRISTIAN H. JR.; HENDRICKSON, §
RAYMOND T.; HENRY, JERRY W.; HENRY §
MRS. J.; HENS, ROBERT J.; HESS, CAN- §
DINA A.; HESS, MICHAEL H.; HEYWARD, §
JUANITA; W.; HEYWARD, MICHAEL E.; §
HEYWARD, PERCELL E.; HEYWARD, §
ROBIN M.; HICKS, KATHLEEN M.; HICKS, §
WILLIE A.; HIGDON, MICHAEL A.; HILL §
BENNIE D.; HILL CHARLES R.; HILL, §
DAVID L.; HILL, MRS. C.; HILL, SHARON; §
HINE, MICHAEL S.; HISE, KAREN D.; §
HISSE, RICHARD A.; HOBACK, DENNIS, §
G.; HOBACK, PEGGY J.; HOLLOWAY, §
RONALD M.; HOLLOWAY, SONZIA F.; §
HOLLOWAY, STEVEN D.; HOLMAN, §
DAVID A.; HOLMAN, SHERI N.; HOLMES, §
JACK; HOLMES, JAMES M.; HOLMES, §
VICTOR A.; HOLT, DAISY S.; HOLT, § C.A.-1-85-6065
DELBERT R.; HOLT, GERALDINE; §
HOLT, HIRAM B.; HOMICKI, FRANCES; §
HOMICKI, JOHN J.; HOOPER, PHILLIP W.; §
HOOPER, ROBERT L.; HORNE, GORDON §
R.; HORNE, LOIS D.; HOSKINS, TERRY §
L.; HOUSER, GARY R.; HUBBARD, ELANOR §
A.; HUBERT, CURTIS L. JR.; HUBERT, §
MRS. C.; HUERTAS, LOURDES; HUERTAS, §
WILFREGDO; HUGHES, CHARLES R.; §
HUGHES, GLENDA; HUGHES, GUS T.; §
HUNDAGL, VICTOR A.; HUNYADY, PAM- §
ELA J.; HUSSEY, BOBBY L.; HUTCHINS, §
GAIL L.; HUTCHINS, HAROLD V.; HUX, §
WILLIAM F.; HYATT, CLAUDE; IMES, §
GEORGE T.; IMES, YONG A.; INGLE, AR- §
THUR D.; IRLANDA, ANGEL N.; IRVIN, §
ALAN M.; ISABELLA, DANIEL B.; ISA- §
BELLA, VIRGINIA; JACK, LEONDUES E. §
JR.; JACK, PATRICIA; JACKSON, JOHN; §
JAMES, RONNIE L.; JAMES, SHIRLEY; §
JAMIESON, JAN; JAMIESON, ROBERT J.; §
JENKINS, CARLINE; JENNINGS, JOSEPH §
E.; JENSON, PAUL R.; JOHNSON, ETTA; §
JOHNSON, MAUDIE; JOHNSON, MICHAEL §
D.; JOHNSON, ROY L.; JONES, JEROME J.; §
JONES, MONA; JONES, ULUS J.; JONES, §
VERNON W.; JORDAN, ALBERTA; JOR- §
DAN, ESSIC J.; JURNEY, LEE W.; JURNEY, §
LINDA; KAGER, OTTILIE MRS.; KAGER, §

ROY J. MRS.; KANTER, ROY J.; KEWA, FRANK J.; KEAN, TEDDY B.; KEENE, ANDREW; KELLY, DEWEY JR.; KENDALL, FLEMING M. JR.; KENDALL, LEANIE A. JR.; KENNEDY, JAMES C.; KENT, JUDY; KENT, PAUL J.; KEYES, CLEO J.; KEYES, ROGER; KINANN, JEANNE; KINANN, MIKE, KINCAID, WILLIE E. JR.; KINCAID, WILLIE MRS.; KING, FLOYD R. JR.; KING, FLOYD R. JR.; MRS.; KIPP, DENNIS W.; KNAPP, RICHARD A.; KNIGHT, RICHARD R.; KNIGHT, WILLIAM K.; KNOLL, TERRY E.; KNOLL, VICKI J.; KNORR, ALISON J.; KONOPASEK, KENNETH; KONOSPASEK, EVA L.; KOSTUK, ALEXANDER J.; KOSTUK, BONNIE M.; KOSZULINZKI, JAN; KOTNER, HARVEY E.; KOZLOWSKI, RALPH J.; KRAFT, KENNETH R.; KUBAT, BRYAN E.; KUBAT, SONJA; KUHARCIK, MRS.; KUHARCIK, ROBERT C.; KURILKO, EVELYN N.; KURILKO, JAMES H.; KUTZ, ANDREW J.; KUTZ, SUSAN; LAIL, THOMAS E.; LAIL, THOMAS E. MRS.; LAKEY, DORIS; LANE, CHRISTINE; LANE, MICHAEL J.; LANGLEY, MARGARET; LAPIERRE, DAVID C.; LAVERTY, JAMES D.; LAVERTY, JAMES MRS.; LEAF, DOUGLAS W.; LEAF, JACQUELINE; LEBLANC, CAROL; LEBLANC, GEORGE B.; LEBLANC, ROBERT G.; LEBLANC, SUSAN; LEDBETTER, ALBERT R. MRS.; LEDFORD, HAROLD J.; LEDFORD, JEAN F.; LEE, BENSON E. JR.; LEE, GARNELDENE; LEE, KATHLEEN; LEE, PAULINE; LEE, RAYMOND L.; LEE, RICHARD G.; LEE, WALTER; LEMMONS, ROBERT D.; LESTER, JACK E.; LEWIS, DALE; LEWIS, DONALD; LEWIS, LENORE; LEWIS, SUSAN; LEWIS, WILLIAM C.; LINKER, ADRIAN L.; LINKER, MARQUITTA A.; LINT, RALPH A.; LISTER, EDWARD; LITTLE, SAMUEL E.; LOVELL, EDNA R.; LUNDY, CARLIS L.; LUNDY, VELVA L.; MANNING, DEBBIE M.; MANNING, JAMES A. JR.; MANNING, MARVIN M.; MANNING, MARVIN M. MRS.; MANNING, NEIL E.; MARRA, ANTHONY, T.; MARSHALL, JOHNNY L.; MARTELL, ALBERT T. JR.; MARTIN §

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MARTIN, THOMAS J.; MARTIN, WILLIAM; §
MARTINEZ, LUZ C.; MATEJCEK, DIANE §
F.; MATEJCEK, DONALD G.; MATOVIC, §
GERALDINE E.; MATOVIC, ROBERT; MAT- §
THEWS, DAVID G.; MATZ, BRADLEY R.; §
MAYETTE, THERESA B.; MAYETTE, WIL- §
LIAM E. JR.; MAYS, WILLIE L.; MAYS, §
WILLIE L. MRS.; MCCALL, CYNTHIA S.; §
MCCALL, TIMOTHY D.; MCCARTHY, GER- §
ALD; MCCARTHY, HUGH L.; MCCORMICK, §
CHARLES M.; MCCOY, JAMES C.; MC- §
DOWELL, CHARLES P.; MCDOWELL, LIN- §
DA S.; MCELVEEN, CLIFFORD D.; MCFAR- §
LAND, DENNIS P.; MCINTOSH, ESLIE B.; §
MCKINNEY, JACQUELINE; MCKINNEY, §
REGINALD; MCLEOD, WILLIE JR.; MC- § C.A.-1-85-6065
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MEACHAM, DANIEL A.; MEADE, GREG- §
ORY L. MELENDEZ, JAIME; MELENDEZ, §
JAIME MRS.; MELNYK, KASIMIR; MEL- §
NYK, MARY L.; MESCIA NICHOLAS JR.; §
MESCIA, SHARON E.; MESSETT, TIMOTHY §
L.; METCALF, BERNARD E.; METCALF, §
MARCEL; MEYERS, ROBERT JR.; MIDDLE- §
TON, DAVID A.; MIDDLETON, VIRGINIA §
A.; MIGLIORINO, CHARLES; MILES, JAMES §
R.; MILES, JAMES R. MRS.; MILLEDGE, §
DONALD; MILLEDGE, MRS.; MILLER, §
BILLY E.; MILLER, BRENDA; MIMS, LE- §
ROY R.; MITCH, ROBERT; MITCHELL, §
MICKEY F.; MIZE, OLA L.; MOLLOY, ROB- §
ERT F.; MONAGHAN, CYNTHIA; MOODY, §
PAUL E.; MORIM, DALE L.; MORLEY, §
GINGER; MORLEY, JOHN M.; MORRISON, §
KAREN A.; MORROW, MARK; MORTEN- §
SON, DAVID C.; MORTENSON, SANDRA; §
NASH, JAMES; NASH, JAMES MRS.; NAY- §
LOR, ERVIN E.; NEAL, ROBERT JR.; NEAL, §
ROBERT JR. MRS.; NELSON, ERNEST W.; §
NELSON, CAROLYN S.; NELSON, HOBERT §
W.; NEUNER, OANH; NEUNER, RICHARD §
D.; NEVADOMSKI, EDWARD JR.; NEVA- §
DOMSKI, MARILYN; NEWMAN, GEORGE §
M.; NICHOLS, CHARLES R.; NICHOLS, §
JUDY G.; NOBLES, RICHARD A.; NOR- §
BLOM, RICHARD W.; NORTH, DAVID A.; §

NUNNERY, LESLIE; NUNNERY, SYBIL; §
OBERG, JAMES E.; OBERG, SUSAN M.; §
OCONNELL, DEBORAH; OCONNELL, THOM- §
AS E.; ODONNELL, JAMES E.; ODONNELL, §
ROSE M.; OGDEN, HEATHER A.; OGDEN, §
NANCY ANN; OGDEN, ORVILLE L.; OGLE §
LINDA SUE; OLD, DOUGLAS J.; OLD, MAR- §
CIA C.; OLD, MARILYN; OLIVERIA, PAT- §
RICK W.; OLIVERIA, TARLENE; OLSON, §
THOMAS M.; OLSON, THOMAS M. MRS.; §
OMARA, JUDITH; OMARA, RICHARD K.; §
ONEAL, JAMES MRS.; ONTIVEROS, §
GLORIA; ONTIVEROS, LUIS C.; OROURKE, §
JOHN; OROURKE, THERESA; ORTIZ, MI- §
QUEL JR.; ORTIZ, ROUEN; OSBORNE, HIL- §
LARD J.; OXENDINE, WILLIAM A.; PACK- §
ETT, PHILIP S.; PALUMBO, BONNIE; PA- § C.A.-1-85-6065
LUMBO, DONATO; PANJARELLA, AN- §
THONY J.; PARNELL, CAROLYN; PAR- §
NELL, CAROLYN; PARNELL, ROBERT L.; §
PARRISH, KARL A.; PARSLEY, JANIE; §
PARSLEY, RONNIE A.; PATE, CHARLES §
E.; PATTERSON, ARTHUR J.; PATTERSON, §
JAMES J.; PATTERSON, MRS. A.; PATTER- §
SON, MRS. J.; PATTON, DAVID D.; PAT- §
TON, SALLY; PATZER, GENE W.; PAULSON, §
ELOISA M.; PELLEGRINO, ROBERT; PES- §
TANA, CAROL; PESTANA, WILLIAM M.; §
PETERSON, BARBARA; PETERSON, STE- §
PHNE; PETTRBONE, CHARLES N.; PHIL- §
LIPS, BEVERLY; PHILLIPS, EUGENE L.; §
PHILLIPS, WAYNE H.; PHILLIPS, WAYNE §
H. MRS.; PIPPIN, TERRY D.; PITZYKOW- §
SKI, LUISA Q.; PLOTT, GUY A. JR.; POIN- §
TON, GEORGE E.; POLAKIEWICZ, LEORA; §
POPP, STEVE F. SR.; POSEY, ROBERT H.; §
POWERS, DEBRA A.; POWERS, JOHN M.; §
PRESSLEY, TAD W.; PREWITT, WILLIE D. §
JR.; PRICE, JOHN H.; PRICE, KENNETH §
W.; PRICE, LAILA L.; PRICE, LORRIANE §
Y.; PRICE, ROBERT P.; PRICE, VIRGINIA; §
PROCTOR, ROBERTA; PULSIPHER, ELWIN §
D.; PUTMAN, DAVID L.; PUTMAN, DAVID §
L. MRS.; QUILES, GEORGE L.; RAMIREZ, §
MIGUEL R.; RANCH, JOHN D.; RATHELL, §
JOAN L.; RAWLINGS, CHARLES E.; RAY- §
DER, JOSEPH P.; RAYDER, JOSEPH P. §

MRS.; REARDON, BETH; REARDON, JAMES J.; RECHT, DOUGLAS T. MRS.; REDCAY, MEREL, MRS.; REDCAY, MERLE; RENEAU, JOHNIE J. JR.; RENEAU, JOHNIE J. JR. MRS.; RHAMES, FREDDI T.; RICHARDSON, JACK L.; RICKS, JAMES E.; RIEDEL, RONALD F.; RIELLY, TERRENCE P.; RIGGIO, KENNETH W.; RIGGIO, SONJA A.; RIGGS, GARY A.; RIORDAN, JOHN P.; RIVERS, MARK J.; RIVERS, NANCY L.; ROANE, JOHN R.; ROANE, JOHN R.; ROANE, JOHN R. MRS.; ROBBINS, MARY ROBBINS, MICHAEL W.; ROBERTS, FRANKLIN; ROBERTS, MRS. JOHN; ROBERTSON, DANIEL V.; ROBINSON, CAROLYN D.; ROBINSON, NAKITE L.; ROBINSON, ONNIE B.; RODGERS, JAMES D.; RODGERS, MRS. JAMES; ROTELLA, JOSEPH M. JR.; ROWELL, ELSYE H.; RUBIO, ANTHONY L.; RUBLE, LANCE H.; RUMLEY, DEBRA T.; RUMLEY, DEBRA T.; RUMLEY, ROGER C.; RUNION, CARL A.; RUNION, CARL A. MRS.; RUPERT, DORENE; RUPERT, FREDERICK J.; RUTLEDGE, HARRY R.; RUTLEDGE, HELEN; RYAN, PATRICK; SALAZAR, GREGORIO JR.; SANCHEZ, JESSE JR.; SANCHEZ, JESSE L. MRS.; SANDERS, JAMES H.; SANDERS, JAMES H. MRS.; SAXBY, ANDRE; SAXTON, HAROLD E.; SAXTON, JUANITA; SCHROEDER, BEATRIX; SCHROEDER, MARTIN H.; SCHWARCHBER, ALEX; SCORSESE, PAUL J.; SCOTT, LEONARD H.; SCOTT, ROBERTA; SEIVERT, CHARLES W.; SEXTON, JOHN; SHELL, JAMES E.; SHELL, MARY L.; SHIRLEY, JACK L.; SHOGREN, DEBORAH K.; SHOGREN, MICHAEL R.; SHREINER, MANETTE; SIMON, LAFAYE A.; SINGLETON, DONALD; SINGLETON, LETHA; SKIBA, FRANCES J.; SKLADANOWSKI, MARY; SKLADONOWSKI, DAVID; SMITH, BECKY L.; SMITH, BETTY J.; SMITH, DALE C.; SMITH, DIANE; SMITH, EILEEN; SMITH, GARY J., SR.; SMITH, GERALD W.; SMITH, HOWARD H.; SMITH, KATHLEEN J.; SMITH, ROBERT C. MRS.; SMITH, WIL-

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LIAM A.; SMITH, WILLIAM E. JR.; SMITH, §
WILLIAM E. J. MRS.; SOUTHWARD, PA- §
TRICIA A.; SOUZA, JENNIFER C.; SOUZA, §
JOHN P.; SPANO, THOMAS A.; SPEDDING, §
CLINTON A. JR.; SPEDDING, MRS. C.; §
SPEIRER, KATHLEEN; SPEIRER, RONALD; §
SPIGARELLI, DOROTHY; STANCIL, RAY- §
MOND N.; STANTON, THOMAS W.; STEIN, §
MARK; STEIN, MARK MRS.; STEPHENS, §
THOMAS J.; STEPHENS, THOMAS J. MRS.; §
STEVENS, CARL F. II; STEVENS, CARL F.; §
STEVENS, MRS.; STORCEY, JAMES D.; §
STORCEY, JAMES D. MRS.; STOVALL, LIN- §
DA; STOVALL, ROBIN R.; STARCNER, LE- §
ROY; MRS. STRACNER; STREET, STREET, §
STEPHEN; STRICKLAND, GAIL; STROUSE, §
WILLIAM H. JR.; STROUSE, WILLIAM H. §
MRS.; STRUM, WARREN P.; SUBER, BILLY § C.A.-1-85-6065
R.; SUGGS, JOHNNY M. SUNDIN, BAR- §
BARA; SUNDIN, ROBERT; SWEATT, THOM- §
AS; SWENSON, WALTER A.; TALIAFERO, §
JOE L.; TAMEZ, NOEI; TAMEZ, RENE R.; §
TAYLOR, CAROL A.; TAYLOR, DAVID A.; §
TAYLOR, JOSEPH F.; TAYLOR, LESTER K.; §
TAYLOR, RICHARD D.; THAW, JANIS; §
THAW, JOEL M.; THOMAS, EMILIA JR. §
MRS.; THOMAS, HORACE F.; THOMAS, §
WILLIAM E. JR.; THOMAS, WILLIE F.; §
THOMPSON, DAVID; THOMPSON, LEON- §
ARD B.; THOMPSON, ROBERT JR.; §
THOMPSON, ROGER D.; THURMOND, §
TALMADGE M.; THURMOND, YVONNE H.; §
TIGHE, JOAN; TIGHE, PETER; TORO, COR- §
SINO, JR.; TORO, LUZ N.; TORRES, HEC- §
TOR D.; TORRES, TERESA L.; TRAUTMAN, §
MELVIN; TREDWAY, GARY L. SR.; TUCCI, §
FRANK D.; TUCKER, RAYMOND, A.; TUR- §
NER, DEAN E.; TURNER, JAMES L.; TUR- §
NER, JESSIE M. TURNER, WANDA H.; UHL, §
MICHAEL; URSEY, GRADY; VALERIO, §
NANCY G.; VALERIO, ROBERT G.; VAN- §
LEUVAN, EDWARD J.; VANLEUVEN, ED- §
WARD, MRS.; VAUGHN, EDWARD J.; VENE- §
DETTI, AUGUSTINE; VENTRIGLIA, MRS.; §
VERNIER, DOUGLAS J.; VERVILLE, DAN- §
IEL A.; VERVILLE, HELEN; VIDIELLA, §
JOHN E.; VIDRINE, GEORGE A.; VIGNALE, §

CAROLYN; VIGNALE, ROBERT P.; VITKACS, EUGENE; VIVKSON, GILBERT; VOLGERSON, RON; WAGAMAN, DONALD W.; WAGAMAN, FREDA; WAGAMAN, GREGORY; WAGHELSTEIN, JOHN D.; WAID, EDWARD, D. JR.; WAID, KATHLEEN; WALKER, CHARLES; WALKER, JACQUELINE; WALKER, LARNZO; WALLACE, GEORGE F.; WALLACE, RUSSELL; WALTERS, LEO; WALTERS, LINTON P.; WARD, HELGA; WEINSTEIN, JACQUES W.; WEISSIND, BILLY R.; WEISSIND, NANCY; WELLS, EDWARD L.; WELLS, PAMELA; WEST, VIVIAN L.; WESTERFIELD, ELFREDA; WHEELER, LARRY H.; WHEELER, LINDA K.; WHITE, ATLAS; WHITE, ATLAS MRS.; WICK, DONALD; WICK, GAYLEEN R.; WILBER, ROBERT E.; WILBER, SHARON F.; WILGEN, JOSEPH P.; WILLIAMS, ANDREW F.; WILLIAMS, CHARLIE W.; WILLIAMS, CLARENCE C.; WILLIAMS, GLORIA D.; WILLIAMS, JACOB W. JR.; WILLIAMS, LOIS L.; WILLIAMS, ROSEMARIE; WILLIAMSON, P. LANE; WILSON, DORELLE F.; WILSON, KENNETH C.; WILSON, KENNETH R.; WINTERS, EDWARD M.; WISE, GARY B.; WOOD, DENNIS E.; WOODCOCK, STEPHEN M.; WYSINGER, JOE; WYSINGER, SHIRLEY; YATES, FAY A.; YATES, JERRY W.; YATES, ROBERT S.; YEAGLEY, JAMES F.; YOUNG, ROBERT A.; ZASKEY, ALEXANDER J.; ZIMMERMAN, GEORGE H. JR.; ZIMMERMAN, KATHLEEN; ZIOLKOWSKI, ALFRED N.; ZIOLKOWSKI, CATHY A., Individually And For Those Similarly Situated.

Plaintiffs,

v.

UNITED STATES OF AMERICA, SECRETARY OF THE NAVY OF THE UNITED STATES AND THE ATTORNEY GENERAL OF THE UNITED STATES,

Defendants.

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APPENDIX II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL NO. 381

No. CV-86-376

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

THOMAS ADAMS, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM and ORDER

APPEARANCES:

Benton Musselwhite
Attorney for Plaintiffs

Robert C. Longstreth, Department of Justice,
Washington, D.C.
Attorney for Defendant United States

WEINSTEIN, Ch. J.:

This is an action brought by over one thousand three hundred plaintiffs alleging injuries caused by the exposure

to Agent Orange and other herbicides of those plaintiffs who served in Vietnam. The case, originally filed in the Southern District of Texas, was transferred to this court by the Judicial Panel on Multidistrict Litigation. The defendant United States government now moves for dismissal of the complaint or, in the alternative, for summary judgment.

The complaint in this action is virtually identical to the Eighth Amended Complaint filed July 23, 1984 in MDL No. 381 by the Agent Orange Plaintiffs' Management Committee. The disposition of the claims made in that complaint is reported in *In re "Agent Orange" Product Liability Litigation,* 603 F. Supp. 239 (E.D.N.Y. 1985). The court sees no reason to depart now from its earlier conclusions. The government's motion to dismiss the complaint is granted as to the claims by veterans and the derivative claims made by their wives and children. The government's motion for summary judgment is granted as to the independent claims of veterans' wives. The independent claims of veterans' minor children are dismissed without prejudice in the discretion of the court.

So ordered.

Dated: Brooklyn, New York
June 19, 1986

/s/ JACK B. WEINSTEIN
Chief Judge, U.S.D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL No. 381

No. CV-86-376

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

THOMAS ADAMS, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

FINAL JUDGMENT

APPEARANCES:

Benton Musselwhite
Attorney for Plaintiffs

Robert C. Longstreth, Department of Justice,
Washington, D.C.
Attorney for Defendant United States

WEINSTEIN, Ch. J.:

This matter having come before the court on the motion of the defendant United States of America, pursuant to Rules 12(b)(1) and 12(b)(6) and Rule 56 of the

Federal Rules of Civil Procedure, to dismiss this action, or in the alternative for summary judgment; and the court having considered the motion and supporting papers, and having considered the plaintiffs' response; and the court having heard oral argument, for the reasons stated orally on the record and by memorandum,

IT IS ORDERED that the motion of the United States of America to dismiss this action is granted, except as to plaintiffs' claims for birth defects and miscarriages; and it is further

ORDERED that the motion of the United States of America for summary judgment is granted as to the claims of plaintiffs who are wives of veterans for birth defects and miscarriages; and it is further

ORDERED that the claims of plaintiffs who are children of veterans for birth defects are dismissed without prejudice in the discretion of the court.

This constitutes a final judgment.

So ordered.

Dated: Brooklyn, New York
June 18, 1986

/s/ JACK B. WEINSTEIN
Chief Judge, U.S.D.C.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 343—August Term, 1986

(Argued: October 1, 1986 Decided: April 21, 1987)

Docket No. 86-6127

In Re: "Agent Orange"
PRODUCT LIABILITY LITIGATION

THOMAS ADAMS, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

Before:

VAN GRAAFEILAND, WINTER *and* MINER,
Circuit Judges.

Appeal from order and judgment of the United States District Court for the Eastern District of New York (Weinstein, C.J.) dismissing post-settlement Agent Orange claims. Judgment affirmed except as to the grant of summary judgment dismissing the so-called direct claims

of wives and children. Summary judgment as to said direct claims vacated and these claims remitted to the district court with instructions to dismiss them for lack of jurisdiction.

BENTON MUSSLEWHITE, Houston, Texas, *for Plaintiffs-Appellants.*

ROBERT C. LONGSTRETH, Trial Attorney, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Washington, D.C., Andrew J. Maloney, United States Attorney for the Eastern District of New York, and Joan M. Bernott, Special Litigation Counsel, Washington, D.C., of counsel), *for Defendant-Appellee United States of America.*

VAN GRAAFEILAND, *Circuit Judge:*

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273.

Following settlement of the class action against the chemical companies and the dismissal of all claims against the Government, this action was commenced in the United States District Court for the Southern District of Texas. In January of 1986 it was transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation, and on June 19, 1986 the complaint, like those that preceded it, was dismissed. The claims of the veterans and the derivative claims of their wives and children were dismissed for lack of jurisdiction.

The direct claims of the wives and children were dismissed by way of summary judgment for lack of proof of medical causal relation. We hold that the direct claims of the wives and children, like those of the veterans themselves, should have been dismissed for lack of jurisdiction.

In companion Agent Orange opinions filed herewith, we define the Government's decision to use Agent Orange as a military decision, a political decision and the exercise of a discretionary function. These definitions were arrived at by scrutinizing the nature of the governmental action, not the identity of the person challenging it. "There are twelve exceptions to the [Federal Tort Claims] Act, but they relate to the cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries." *Feres v. United States,* 177 F.2d 535, 536-37 (2d Cir. 1949), *aff'd,* 340 U.S. 135 (1950). It would be anomalous, for example, to characterize a governmental decision as political or discretionary in an action brought by a serviceman but as apolitical or mandatory in an action brought by the serviceman's wife or child. When a challenged decision falls within all three of the above categories, military, political and discretionary, it is imperative that a court look primarily to the "cause of injury rather than to the character of a claimant." However, even when the decision properly may be placed in only one of the three categories, a court should use great circumspection in deciding whether it is the type of governmental action that should be subjected to judicial second-guessing.

Some of the post-*Feres* cases brought by wives, widows and children of servicemen have had their origin in States where the plaintiffs' claims are held to be ancillary or derivative to those of the servicemen. Others have arisen in States where the plaintiffs' causes of action have been

held to be independent of those of the servicemen. The result in most cases is the same—the claims are held barred by *Feres* and *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977).

The following cases are typical of those arising in the "ancillary or derivative claims" jurisdictions: *Hinkie v. Untied States,* 715 F.2d 96 (3d Cir. 1983), *cert. denied,* 465 U.S. 1023 (1984); *Mondelli v. United States,* 711 F. 2d 567 (3d Cir. 1983), *cert. denied,* 465 U.S. 1021 (1984); *Lombard v. United States,* 690 F.2d 215 (D.C. Cir. 1982), *cert. denied,* 462 U.S. 1118 (1983); *Scales v. United States,* 685 F.2d 970 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082 (1983); *Laswell v. Brown,* 683 F.2d 261 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210 (1983); *Monaco v. United States,* 661 F.2d 129 (9th Cir. 1981), *cert. denied,* 456 U.S. 989 (1982); *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974), *cert. denied,* 420 U.S. 963 (1975). This Court is in accord. *Kohn v. United States,* 680 F.2d 922 (2d Cir. 1982). "As *Stencel* itself illustrates, civilian status alone is not sufficient to lift the bar under *Feres* when a claim involves the same issues as if a serviceman himself sued, for then the relevant policy considerations apply with equal force." *Id.* at 926 (citing *Monaco, supra*).

One of the cases in the "non-derivative or independent claims" group, a case which moved through this Court, was *Harrison v. United States,* 479 F. Supp. 529 (D. Conn. 1979), *aff'd without opinion,* 622 F.2d 573 (2d Cir.), *cert. denied,* 449 U.S. 828 (1980). This was a suit for loss of consortium by a serviceman's wife, who resided in Michigan where her claim was considered to be separate and distinct from that of her husband. Applying the

Feres rationale as reaffirmed and strengthened in *Stencil, supra,* then Chief Judge Clarie held that it barred the claim of the serviceman's wife. He said:

> There has been no suggestion in the legislative history of the Act that Congress was aware that the Tort Claims Act might be interpreted in such an anomalous manner that a serviceman-husband performing his military duty would be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is allowed recovery as a consequence of the same set of facts.

479 F. Supp. at 535. The following cases from other "non-derivative or independent claims" jurisdictions are in accord: *Gaspard v. United States,* 713 F.2d 1097 (5th Cir. 1983), *cert. denied,* 466 U.S. 975 (1984); *De Font v. United States,* 453 F.2d 1239 (1st Cir.), *cert. denied,* 407 U.S. 910 (1972); *United States v. Lee,* 400 F.2d 558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053 (1969); *Van Sickel v. United States,* 285 F.2d 87 (9th Cir. 1960); *Sigler v. LeVan,* 485 F. Supp. 185 (D. Md. 1980).

Of particular interest is an action brought in the United States District Court for the Eastern District of Pennsylvania in 1982 by Louise Shearer, the mother of a deceased serviceman. In Pennsylvania, a cause of action for wrongful death, 42 Pa. C.S.A. § 8301, is possessed by certain specified relatives of the deceased, who recover in their own behalf and not as beneficiaries of the deceased's estate. *McClinton v. White,* 285 Pa. Super. 271, 278 1981), *vacated on other grounds,* 497 Pa. 610 (1982). With obvious reference to section 8301, the district court held that "[t]he *Feres* doctrine applies in cases in which

a personal representative brings an action under a state death statute which is not derivative in nature, but is an original and distinct cause of action granted to such individuals to recover damages sustained by them by reason of the wrongful death of the decedent." 576 F. Supp. 672, 673 n. 1. Finding that plaintiff's allegations of wrongdoing "relate directly to decisions of military personnel made in the course of the performance of their military duty," *id.* at 674, the court granted summary judgment dismissing the complaint. The Court of Appeals for the Third Circuit reversed without discussing the Pennsylvania wrongful death statute, 723 F.2d 1102 (3d Cir. 1983), but was in turn reversed by the Supreme Court in *United States v. Shearer,* 473 U.S. 52 (1985), a decision that is considered to be a major reaffirmation of *Feres* and *Stencel.* The Supreme Court stated that plaintiff's allegation of wrongdoing "goes directly to the 'management' of the military", that it "would require Army officers 'to testify in court as to each other's decisions and actions' ", and that "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convice a civilian court of the wisdom of a wide range of military and disciplinary decisions." 105 S. Ct. at 3043-44.

These were simply restatements and affirmations of language used time and again by the lower courts that have denied recovery by family members. *See, e.g., Hinkie,* 715 F.2d at 98; *Mondelli,* 711 F.2d at 568-69; *Lombard,* 690 F.2d at 223-26; *Monaco,* 661 F.2d at 133-34; *Scales,* 685 F.2d at 970-74.

Where, as here, the military decision is of such a nature that it properly may be termed a discretionary function, denial of recovery by both military and nonmilitary per-

sonnel is doubly warranted. *Abraham v. United States,* 465 F.2d 881 (5th Cir. 1972); *Maynard v. United States,* 430 F.2d 1264 (9th Cir. 1970). Like the Court of Appeals for the District of Columbia, "[w]e will not permit a suit for damages occasioned by activities that are not meaningfully separable from a protected discretionary function." *Gray v. Bell,* 712 F.2d 490, 516 (D.C. Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984).

In a companion opinion filed herewith, 85-6153 *et seq.*, we discuss the political nature of the President's decision to authorize the use of Agent Orange and point to that factor as a third cogent reason why there should be no second-guessing by the judiciary.

The judgment of the district court is affirmed except as to that portion which dismisses the so-called direct claims of the wives and children by way of summary judgment. That portion of the judgment is vacated, and the wives' and childrens' so-called direct claims are remanded to the district court with instructions to dismiss them for lack of jurisdiction.

No costs to any party.

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1077, 1078, 1079—August Term, 1985

(Argued: April 10, 1986 Decided: April 21, 1987)

Docket Nos. 85-6091, -6093, -6095

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

PHILIP J. AGUIAR; WESLEY L. BELL; ROBERT BLAKE, II, individually and as guardian ad litem for JESSICA L. BLAKE; RICK L. BUTLER; ANTHONY A. DE RAPS; JAMES K. EFISHOFF; JUAN H. GONZALES; CHARLES W. HALL; WILLIE N. HOWARD; CLIFFORD N. HUCKABAY, individually and as guardian ad litem for GINA MARIE HUCKABAY; RAY C. JONES; GLEN J. MARTIN, JR.; TIMOTHY J. MC CORMICK; MICHAEL J. MC TIGHE; BEVERLY NEHMER, individually and as guardian ad litem for RICHARD ALLAN NEHMER; CLARENCE A. PERRY, individually and as guardian ad litem for SHON CARLOS PERRY and BRANDON VIDAL PERRY; ALVIN G. RINEBARGER, individually and as guardian ad litem for IAN L. RINEBARGER, STRAH K. RINEBARGER, and BROGUE C. RINEBARGER; ROBERT EL. L. SHIPPEN; LLOYD W. SNYDER; JOE VALENZUELA; WILLIAM G. WAMSLEY; JAMES A. ABERNATHY; FRANCES J. BARNES; RICHARD A. BUNKER;

JOHN F. BISSELL; RUFUS DIAGLE; MERLE J. FULTON-SCOTT; RICHARD A. GARCIA; ROBERT W. GILLESPIE; KATHLEEN E. GILLESPIE; JIMMY L. GILYARD; ROOSEVELT GIVENS; RANDOLPH HARRIS; SAM HAYNES; JOHN MANKOWSKI; MICHAEL L. MATTHEWS; TOMMY L. NEWTON; ALLAN L. NYHART; JOHN T. PEEFF; ANDREW D. ROMEROI; RAUL G. SCHOENSTEIN; JOHN R. SHAW, III; JOHN L. SHUMPERT; GEORGE T. SOUZA; PETER S. TIFFANY; JOSEPH L. VARGAS; WAYNE C. YOUNG; GERRIE CLAY, individually and as guardian ad litem for TREALIFA CLAY and PENNIE CLAY; each of said plaintiffs individually and as representative of all those similarly situated,

— *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA; JOSEPH MAXWELL CLELAND, Administrator, United States Veterans Administration, and his successors, ROBERT E. NIMMO and HARRY N. WALTERS; GUY MC MICHAEL, General Counsel, United States Veterans Administration, and his successor, JOHN MURPHY; DONALD CUSTIS, Chief Medical Director, United States Veterans Administration, and the Acting Chief, JOHN GRONVALL; CHARLES PECKARSKY, Chief Benefits Director, United States Veterans Administration, and his successor, DOROTHY STARBUCK; and the VETERANS ADMINISTRATION of the UNITED STATES and other departments and agencies of the United States Government, as their several interests may appear, and successors to the above officials, as necessary,

Defendants-Appellees.

DAN FORD, and his wife, CHRISTINA FORD; individually, and as members and representatives of a class,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

DANIEL C. BATTS,
Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

LOUGHERY, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

Before:

VAN GRAAFEILAND, WINTER and MINER,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Eastern District of New York (Weinstein, C.J.), dismissing so-called "Agent Orange" complaints against the United States.

Dismissed in part and affirmed in part.

JOAN M. BERNOTT, Special Litigation Counsel, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Arvin Maskin, U.S. Att'y, Washington, D.C., and Raymond J. Dearie, United States Attorney for the Eastern District of New York, of Counsel), *for Defendant-Appellee United States of America.*

NEIL R. PETERSON, Philadephia, Pa. (Gene Locks, Greitzer and Locks, Philadelphia, Pa., of Counsel), *for Plaintiffs-Appellants.*

David W. Moyer and Philip E. Brown, Hoberg, Finger, Brown, Cox & Molligan, San Francisco, Ca., of Counsel), *for Plaintiffs-Appellants.*

Thomas Henderson, Pittsburgh, Pa. (Henderson & Goldberg, Pittsburgh, Pa., of Counsel), *for Plaintiffs-Appellants.*

David J. Dean, Carle Place, N.Y. (Dean, Falanga & Rose, Carle Place, N.Y., of Counsel), *for Plaintiffs-Appellants.*

John O'Quinn, Houston, Texas (O'Quinn, Hagan & Whitman, Houston, Texas, of Counsel), *for Plaintiffs-Appellants.*

Stanley M. Chesley, Cincinnati, Ohio (Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio, of Counsel), *for Plaintiffs-Appellants.*

Newton B. Schwartz, Houston, Texas, *for Plaintiffs-Appellants.*

Stephen J. Schlegel, Chicago, Ill. (Schlegel & Trafelet, Chicago, Ill., of Counsel), *for Plaintiffs-Appellants.*

VAN GRAAFEILAND, *Circuit Judge:*

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273.

In addition to the numerous individual claims spawned by Agent Orange, two large class actions were brought. The first, against the chemical companies, was settled. The second, against the United States, was dismissed, and the dismissal is being challenged on this appeal.

At the outset of this litigation, ingenious counsel, concerned that they might not be able to state a claim for relief under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), attempted to invoke federal court jurisdiction by also alleging constitutional and civil rights violations, mandamus and equitable jurisdiction. These additional grounds for the exercise of jurisdiction were properly rejected by the district court. *Ryan v. Cleland,* 531 F. Supp. 724, 730-33 (E.D.N.Y. 1982); *see Chappell v. Wallace,* 462 U.S. 296 (1983). They have not been asserted on this appeal. Appellants' claims now before us are predicated solely on the provisions of the FTCA.

Because the case comes to us in a rather peculiar posture, familiarity with the administrative claim requirements of the FTCA is necessary for an understanding of the discussion that follows. The administrative claim requirements of the FTCA, 28 U.S.C. § 2675(a), prohibit an action seeking money damages from the United States for personal injury or death unless the claimant has first presented the claim to the appropriate federal agency and it has been denied. Interpretative regulations provide that the claim must be presented in writing by the injured

person or his duly authorized agent or legal representative and must be for "money damages in a sum certain." 28 C.F.R. §§ 14.2(a), 14.3(b). Section 2401(b) of 28 U.S.C. sets up a two-year limitation period for the filing of claims.

Shortly after the original class action was brought in 1979, the plaintiffs moved to be relieved of the requirement of filing separate claims in order to protect their individual rights. Then District Judge George Pratt, to whom the case was assigned, correctly held that the filing requirements were jurisdictional in nature and that the court could not order the Government to ignore the statutory requirements. *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 757, 760-61 (E.D.N.Y. 1980). As might have been expected, plaintiffs' attorneys thereafter concentrated most of their fire on the chemical companies.

However, after the class action against the chemical companies was settled in 1984, an "Eighth Amended Complaint" was filed against the Government and certain Government officials on behalf on the above-captioned "Aguiar" group of plaintiffs and Dan and Christina Ford. The complaint identified a proposed class as:

> persons who were in the United States, New Zealand or Australian Armed Forces and assigned to Vietnam during the hostilities from 1961 to 1972, who claim injury from exposure to Agent Orange (and other phenoxy herbicides) and their spouses, parents and children born before September 1, 1984 (or such other later date as may be fixed by this Court) who claim direct, indirect, independent or derivative injury as a result of such exposure.

In a Memorandum Order and Judgment, 603 F. Supp. 239, Chief Judge Weinstein, who succeeded Judge Pratt, denied the plaintiffs' motion for class certification, *id.* at 242, and granted the Government's motion for summary judgment against "all claims direct or derivable of the veterans and their wives and against all of the children's derivative claims" and dismissed the direct claims of the children without prejudice. *Id.* at 248.

Three notices of appeal then were filed. The caption of the first contained the names of all the above-captioned plaintiffs-appellants. It was filed by the "Agent Orange Plaintiffs' Management Committee", which did not identify itself as representing any of the individual plaintiffs-appellants in this action against the Government.[1] The caption of the second contained only the names of the first group of plaintiffs-appellants above named, beginning with "Aguiar" and ending with "Clay", and was filed by the firm of Hoberg, Finger, Brown, Cox & Molligan as "Attorneys for Plaintiffs". The third caption contained only the names of the cases referred to in the district court's opinion as having been "previously dismissed", beginning with *"Loughery v. United States"* and concluding with *"Xirau v. Dow Chemical Co."*, 603 F. Supp. at 248-49. This notice of appeal also was filed by the Agent Orange Plaintiffs' Management Committee, which did not describe itself as the attorney for any of the plaintiffs in that group of cases.

The Government contends at the outset that the appeal should be dismissed as academic because class certifica-

1. The Agent Orange Plaintiffs' Management Committee is the successor to a committee appointed in 1980 to represent a tentatively certified plaintiffs' class in an action against the chemical companies. *See In re "Agent Orange" Product Liability Litigation, supra,* 506 F.Supp. at 788; 534 F.Supp. 1046, 1052-53, 611 F.Supp. 1452, 1454.

tion was denied in the instant action and there is no individual appellant. "Instead", the Government argues, "this appeal is brought by Committee counsel acting exclusively as a *pro bono* fiduciary for a decidedly uncertified class, many or most of whose numbers disavow the complaint." This, we think, misstates the legal issue which the Management Committee's unusual procedure has created. The denial of class certification does not preclude individual plaintiffs properly before the court from pressing their own claims, 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1795 at 322. These may include an appellate challenge to the denial of class certification. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 393 (1977). The question, then, is not whether the individual party-plaintiffs could make an effective decision to appeal, but whether the Management Committee had the authority to make this decision for them. *See Massachusetts v. Feeney,* 429 U.S. 66 (1976) (per curiam). Insofar as the first and third notices of appeal are concerned, we think that the question must be answered in the negative. The Agent Orange Plaintiffs' Management Committee claims to represent a class, an uncertified class at that, not any individual plaintiffs.

The above described second notice of appeal presents a stronger case for appealability, since it was filed by attorneys claiming to represent all of the individual plaintiffs in the Aguiar group. However, counsel for the Management Committee proceeded to muddy the waters with regard to this appeal with a letter to the Court Clerk in which he stated:

> Mr. Moyer and I, on behalf of the AOPMC, represent the class, as opposed to any particular individ-

> uals on this appeal. The only exception is that Mr. Moyer's firm represents additionally and individually all the plaintiffs in the Aguiar matter (82-780). However, only class issues are here being raised on behalf of those plaintiffs.

After some intervening explanatory paragraphs, the letter concluded:

> This explains why we are withdrawing the third issue pertaining to wives' independent claims for miscarriages. The District Court's determination in that regard could not apply to the class and any appeal thereof would have to be in individual cases in which we have no authorization to proceed and no attorney-client relationship.

If the foregoing statements are correct—and it does appear that the arguments in appellants' briefs are confined to class issues rather than those of any individual plaintiff—this appeal can be quickly disposed of. It is well established that neither the district court nor this Court has jurisdiction over a Federal Tort Claims class action where, as here, the administrative prerequisites of suit have not been satisfied by or on behalf of each individual claimant. *See, e.g., Keene Corp. v. United States,* 700 F. 2d 836, 841 (2d Cir.), *cert. denied,* 464 U.S. 864 (1983); *Lunsford v. United States,* 570 F.2d 221, 224-27 (8th Cir. 1977); *Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers,* 520 F.2d 11, 23-25 (3d Cir. 1975); *Luria v. Civil Aeronautics Board,* 473 F. Supp. 242 (S.D.N.Y. 1979); *Kantor v. Kahn,* 463 F. Supp. 1160, 1162-64 (S.D.N.Y. 1979); *Founding Church of Scientology v. Director, FBI,* 459 F. Supp. 748, 754-56 (D.D.C. 1978).

Assuming that the appeals herein were intended to, and did, include the individual party-plaintiffs' claims, we nonetheless would have no jurisdiction to consider the claims of those plaintiffs who had not met the administrative prerequisites of suit. Although we might remand those cases to the district court for a determination as to which, if any, of the plaintiffs in this group had complied with the FTCA's administrative claim requirements, we see no purpose in doing this if the district court acted correctly in dismissing the cases on the merits. We believe that it did.

In an effort to allege a viable cause of action, plaintiffs' counsel assign their claims of government wrongdoing to three separate time periods—pre-induction, in-service, and post-service. The pre-induction claims are based largely upon an alleged failure to warn of the Agent Orange health hazards to which the inductees would be exposed. The in-service claims deal with the allegedly negligent acts that led to and accompanied the actual exposure. The post-service allegations deal with the Government's failure to warn plaintiffs of the health hazards they faced and to treat or monitor the treatment for plaintiffs' Agent Orange-related illnesses. All of these claims were summarily rejected by the district court. 603 F. Supp. at 242-45.

The ultimate policy decision to use Agent Orange was made by President Kennedy. 603 F. Supp. at 244. He, of course, was Commander in Chief of the Armed Forces with "decision-making responsibility in the area of military operations." *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973). However, in making decisions of this nature, the President does not act alone. Article I, section 8 of the Constitution empowers Congress to "raise and

support Armies" and to "make Rules for the Government and Regulation of the land and naval Forces." *See Rostker v. Goldberg,* 453 U.S. 57, 59 (1981). Pursuant to that authority, Congress has designated the Department of Defense as an Executive Department of the United States, 10 U.S.C. § 131, and has directed the Secretary of Defense, with the assistance of the Joint Chiefs of Staff and advisory committees and panels, to make recommendations and reports to Congress concerning existing and proposed weapon systems, 10 U.S.C. §§ 139, 141, 174. Congress also has created the office of Under Secretary of Defense for Research and Engineering, whose duties include supervising all research and engineering activities in the Department of Defense and advising the Secretary on scientific and technical matters, 10 U.S.C. § 135. Absent a substantial constitutional issue, the wisdom of the decisions made by these concurrent branches of the Government should not be subject to judicial review.

> Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Chappell v. Wallace, supra, 462 U.S. at 301, *quoting Orloff v. Willoughby,* 345 U.S. 83, 94 (1953).

In *Gilligan v. Morgan,* 413 U.S. 1 (1973), in which the Court reversed a Circuit Court order directing a district court to examine the "pattern of training, weaponry and orders in the Ohio National Guard", *id.* at 4, Chief Justice Burger said:

> It would be difficult to think of a clearer example of the type of governmental action that was intended

> by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

Id. at 10-11.

Two well-established doctrines make the foregoing principles of restraint peculiarly applicable to the instant FTCA actions, which ask the judiciary to pass judgment upon the discretionary military decisions involving Agent Orange. The first of these is the so-called "discretionary function" exception to the Government's waiver of immunity under the FTCA, 28 U.S.C. § 2680(a), which we discuss in the *Hogan v. Dow Chemical* opinion, Nos. 85-6223, 85-6341, filed herewith. There, we hold that the Government was performing a discretionary function while field-testing Agent Orange in Hawaii. The second is the so-called "*Feres* doctrine", originating in the seminal case of *Feres v. United States,* 340 U.S. 135 (1950), which prohibits the judiciary from imposing liability upon the United States for injuries to servicemen that "arise out of or are in the course of activity incident to service." *Id.*

at 146. There is little difference between these doctrines as they relate to the facts of the instant case. Both apply to discretionary military decisions. *Perkins v. Rumsfeld*, 577 F.2d 366, 368 (6th Cir. 1978); *Builders Corp. of America v. United States*, 320 F.2d 425 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964). Both preclude judicial "second guessing" in FTCA litigation of discretionary legislative and executive decisions such as those that were made concerning Agent Orange. *See United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (the discretionary function exception) and *United States v. Shearer*, 473 U.S. 52, 57-59 (1985) (the *Feres* doctrine).

Appellants have concentrated their attack on *Feres* which, they say, consists of "perversely overstretched trappings of sovereign immunity", "warped logic", and "balderdash". Confronted with the affirmaton of the *Feres* holding in *United States v. Shearer, supra*, which followed the filing of appellants' original brief, appellants assert in their reply brief that Chief Justice Burger, who wrote *Shearer*, "rambled into *Feres* as dictum." Although *Feres* has not been without its properly less caustic critics, *see, e.g., Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985), it remains the law of the land and is binding on this Court. *Id.* at 202. See also *Chappell v. Wallace, supra*, 462 U.S. 296, and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673-74 (1977).

The recovery which the veterans seek for pre-induction negligence is dependent upon and inseparably intertwined with the injuries they allegedly sustained while in service. In a situation such as this, overwhelming authority holds that *Feres* bars recovery. *See, e.g., Healy v. United States*, 192 F. Supp. 325 (S.D.N.Y.), *aff'd on opinion below*, 295

F.2d 958 (2d Cir. 1961); *Satterfield v. United States,* 788 F.2d 395, 399 n.3 (6th Cir. 1986); *Joseph v. United States,* 505 F.2d 525 (7th Cir. 1974); *Glorioso v. United States,* 331 F. Supp. 1 (N.D. Miss. 1971); *Redmond v. United States,* 331 F. Supp. 1222 (N.D. Ill. 1971).

Application of the discretionary function rule leads ineluctably to the same result. *Dalehite v. United States,* 346 U.S. 15 (1953), the leading case in this field, involved, among other things, a failure to warn. *Id.* at 42, 46-47. Lower courts which follow *Dalehite* have reached the same result. *See Ford v. American Motors Corp.,* 770 F.2d 465 (5th Cir. 1985); *Cisco v. United States,* 768 F.2d 788, 789 (7th Cir. 1985); *Begay v. United States,* 768 F.2d 1059, 1066 (9th Cir. 1985); *Shuman v. United States,* 765 F.2d 283, 291 (1st Cir. 1985); *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243, 245 (3d Cir. 1984), *cert. denied,* 469 U.S. 1228 (1985); *Green v. United States,* 629 F.2d 581, 585-86 (9th Cir. 1980).

If the *Feres* doctrine is to have any meaning at all, the claim for in-service injuries is a classic case for its application. At issue is a decision of the veterans' highest military superiors that was designed to help the veterans in fighting the armed conflict in which they were engaged. "Here, the parties do not dispute that the government's motives in using Agent Orange in southeast Asia were valid military objectives: defoliate jungle growth to deprive enemy forces of ground cover and destroy enemy crops to restrict enemy's food supplies." 506 F. Supp. at 779; *see also* 603 F. Supp. at 244. We find no merit whatever in appellants' argument that the Government should be estopped from relying on *Feres* because, in subsequently opposing certain veterans' claims for bene-

fits, the Government argued that their injuries were not service related, while it contends here that the same injuries were "incident to service." This is a distortion of the Government's position, which is that, if the veterans' injuries were caused by exposure to Agent Orange, a contention which the Government consistently has rejected, they were "incident to service". See also *Henninger v. United States,* 473 F.2d 814, 816 (9th Cir.), *cert. denied,* 414 U.S. 819 (1973), regarding the inapplicability of the doctrine of estoppel in FTCA cases.

In *Dalehite v. United States, supra,* 346 U.S. at 37, the Court said, "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed." The same statement may be made with regard to Agent Orange. The discretionary function exception clearly is applicable to the veterans' in-service injuries.

We agree with both Judge Pratt and Chief Judge Weinstein that the veterans' claims for post-service injuries are inseparably entwined with and directly related to their military service. See 506 F. Supp. at 779 and 603 F. Supp. at 244-45. The majority of other Circuits would rule similarly. *See, e.g., Heilman v. United States,* 731 F.2d 1104, 1108 (3d Cir. 1984); *Gaspard v. United States,* 713 F.2d 1097, 1100-01 (5th Cir. 1983), *cert. denied,* 466 U.S. 975 (1984); *Lombard v. United States,* 690 F.2d 215, 220-23 (D.C. Cir. 1982), *cert. denied,* 462 U.S. 1118 (1983); *Laswell v. Brown,* 683 F.2d 261, 264-67 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210 (1983). *See also Kosak v. United States,* 465 U.S. 848, 854 (1984).

We are not persuaded by plaintiffs' attempts to frame a theory of independent post-service wrongdoing to bring

their claims within the ambit of *United States v. Brown*, 348 U.S. 110 (1954), and cases such as *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981), and *Stanley v. United States*, 786 F.2d 1490 (11th Cir.), *cert. granted*, 107 S. Ct. 642 (1986), which follow *Brown*. The district court did not simply reject plaintiffs' 373-paragraph complaint as an inadequate pleading; the Government's motion was in the alternative, *i.e.*, for dismissal or summary judgment, 603 F. Supp. at 241, and the district court granted summary judgment, *id.* at 248. If anything is clear after reviewing an appellate record of over 16,000 pages, reading hundreds of pages of briefs, and listening to two full days of oral argument, it is that the weight of present scientific evidence does not establish that Agent Orange injured military personnel in Vietnam. Plaintiffs cannot disguise this fact by what the district court termed " 'inventive presentation or artful pleading.' " 603 F. Supp. at 245.

The very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion. The reasoning of the discretionary function cases cited in connection with our discussion of pre-induction failure to warn is equally applicable here. *See In re Consolidated U.S. Atmospheric Testing Litigation*, 616 F. Supp. 759, 774-77 (N.D. Cal. 1985). In considering the discretionary function exception, we are not bound to apply common law tort rules concerning the duty to warn as they may differ from State to State. Since the discretionary function exception of the FTCA does not exist in private tort litigation, "state tort standards cannot adequately control those governmental decisions in which, to be effective, the decision-maker must look to

considerations of public policy and not merely to established professional standards or to standards of general reasonableness." *Hendry v. United States,* 418 F.2d 774, 783 (2d Cir. 1969). *See Mitchell v. United States,* 787 F.2d 466, 468 (9th Cir. 1986).[2]

CONCLUSION

Insofar as the appeals purport to be taken on behalf of a class, they are dismissed. Insofar as the appeals purport to be taken on behalf of individuals, the judgment appealed from is affirmed. No costs to the Government on the appeals.

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2. Insofar as appellants' post-service claims allege failure of the Veterans Administration to provide adequate medical treatment, we agree with Judge Pratt that appellants seek precisely the type of judicial review that Congress, in enacting 38 U.S.C. § 211(a), expressly prohibited. *See Ryan v. Cleland,* 531 F.Supp. 724, 731 (E.D. N.Y. 1982); *See also Papanikoloaou v. Administrator of the Veterans Admin.,* 762 F.2d 8 (2d Cir.) (per curiam), *cert. denied,* 106 S. Ct. 150 (1985); *Hartmann v. United States,* 615 F.Supp. 446, 448-50 (E.D. N.Y. 1985); H.R. No. 91-1166, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 3723, 3729-31.

Supreme Court, U.S.
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DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-347 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DONALD B. AYER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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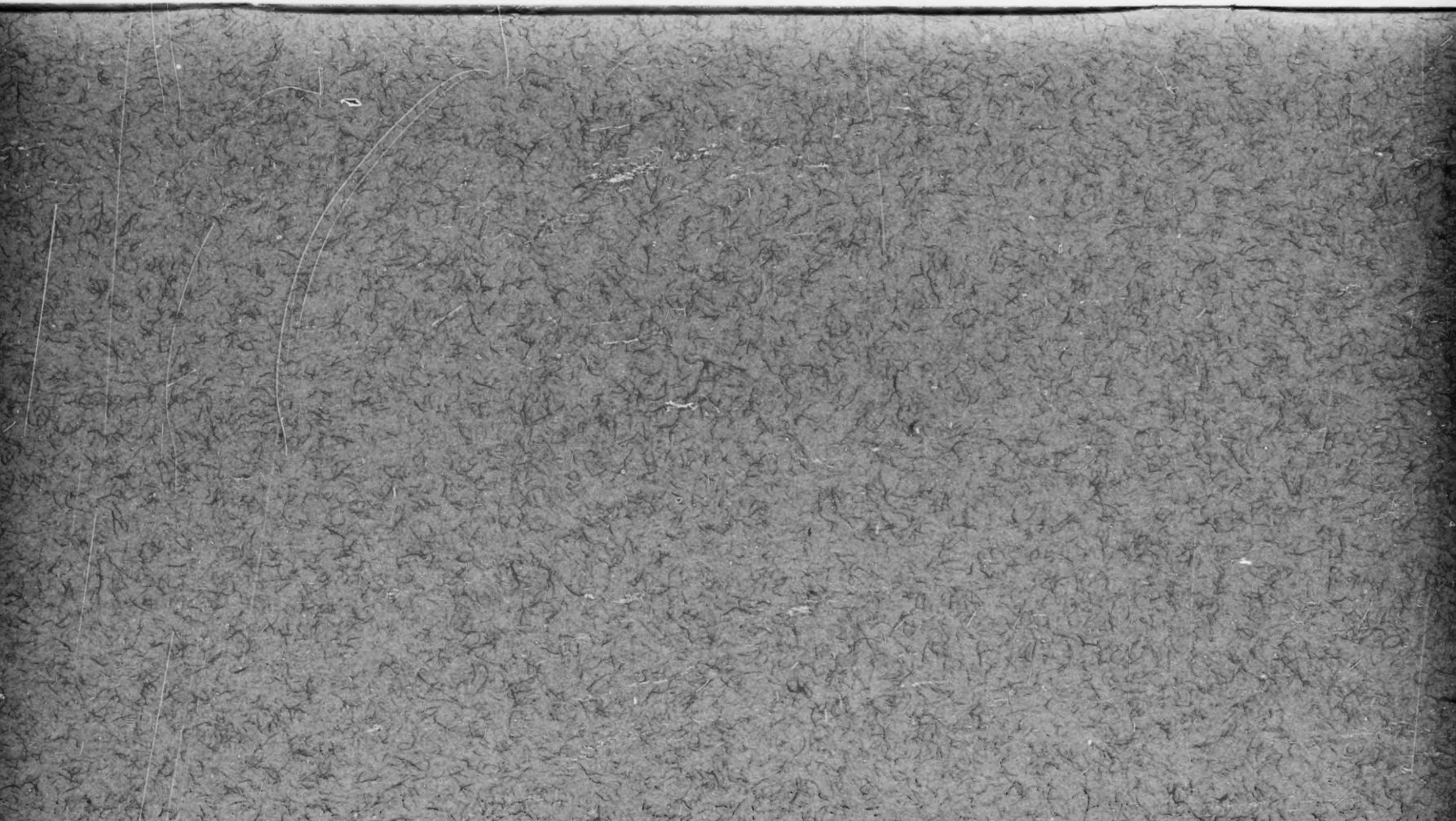


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Federal Tort Claims Act, 28 U.S.C. 2680(a) 1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-347

THOMAS ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, veterans who served in Vietnam and their wives and children, allege that they were injured as a result of the exposure of service members to the herbicide "Agent Orange" and they contend that the courts below erred in concluding that their claims against the government are barred by the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), and the rule of *Feres* v. *United States,* 340 U.S. 135 (1950).

1. Petitioners challenge one of nine related decisions issued by the Second Circuit on April 21, 1987, in the Agent Orange multidistrict litigation (Pet. App. 21a-27a). In doing so, they question the Second Circuit's reasoning in another of those nine related decisions, which more fully elucidates the court's grounds for rejecting petitioners' claims (*id.* at 28a-44a). In this latter case, a number of veterans and their spouses and children, known as the "Aguiar plaintiffs" (*In re "Agent Orange" Product Liability*

Litigation, 818 F.2d 145, 160 (2d Cir. 1987)), sued the government under the FTCA in 1984. The veterans alleged that they suffered various ailments as a result of their exposure to Agent Orange in Vietnam; their wives alleged that they had experienced miscarriages because their husbands had been exposed to Agent Orange; and their children alleged that they suffered birth defects resulting from their fathers' exposure to Agent Orange.

a. The district court held that the claims of the Aguiar plaintiffs were barred by the rule of *Feres. In re "Agent Orange" Product Liability Litigation,* 603 F. Supp. 239 (E.D.N.Y. 1985). The court first held that "[t]here is no question that the veterans' claims against the government for injuries arising from exposure to Agent Orange while in Vietnam are 'incident to service' and barred by the *Feres* doctrine" (*id.* at 243). The court then rejected the plaintiffs' attempts "to circumvent the *Feres* bar through 'artful pleading' " (*id.* at 245). Concerning the plaintiffs' pre-induction claims—that "prior to the induction of many of the servicemen who served in Vietnam, the United States knew or should have known of the hazards posed by exposure to Agent Orange and negligently failed to warn servicemen or take precautions for their safety" (*ibid.*)—the court concluded that any injury resulting therefrom was so related to the veterans' military service that it occurred incident to service. Concerning their post-discharge claims—that the government "failed to warn plaintiffs and see to it that they were properly treated and compensated for any injury sustained" as a result of exposure to Agent Orange (*id.* at 243)—the court similarly concluded that their claims "were 'inseparably entwined' [*sic*] with their military service and so barred by *Feres.*" *Id.* at 244 (quoting *Healy* v. *United States,* 192 F. Supp. 325, 328 (S.D.N.Y.), aff'd, 295 F.2d 958 (2d Cir. 1961)). The court added that the claims were likely barred by the discretionary function exception as well, noting that "the deci-

sion to use herbicides in Vietnam was made by President Kennedy and had the military objectives of clearing underbrush and jungle that provided cover for the enemy and of denying food for opposing forces who were living off the land" (603 F. Supp. at 244).

With respect to the claims of the veterans' wives and children, the district court noted that the government's evidence showed that " 'no laboratory nor epidemiologic evidence exists at this time that is sufficient, to a reasonable degree of certainty or probability, to link embryonal deaths or birth defects to paternal exposure to herbicides while serving in Vietnam' " (603 F. Supp. at 246 (quoting affidavit of Dr. Zena Stein)). The court concluded that "[p]laintiffs have produced no evidence of any probative value to contradict the government's overwhelming showing of no present proof of causation" (*id.* at 247).

Petitioners filed a complaint that is "virtually identical" to the complaint filed by the Aguiar plaintiffs (Pet. App. 18a). Relying on its prior decision, the district court dismissed the veterans' claims, granted summary judgment on the wives' claims, and dismissed the children's claims without prejudice (*id.* at 20a).

b. The court of appeals held that the claims of the Aguiar plaintifffs are barred both by the rule of *Feres* and the discretionary function exception (Pet. App. 28a-44a), after noting that the decision to use Agent Orange, a military decision made by the President with the advice of Congress, is the sort of decision that the courts should hesitate to review (*id.* at 37a-39a). The court found "little difference between these doctrines as they relate to the facts of the instant case. * * * Both preclude judicial 'second-guessing' in FTCA litigation of discretionary legislative and executive decisions such as those that were made concerning Agent Orange" (*id.* at 40a).

With respect to the veterans' claims for in-service injuries, the court found them to be a "classic case" for application of *Feres* (Pet. App. 41a). "At issue is a decision of the veterans' highest military superiors that was designed to help the veterans in fighting the armed conflict in which they were engaged" (*ibid.*). The court also agreed with the district court that the veterans' pre-induction and post-discharge claims were so intertwined with their military service that they are barred by *Feres* (*id.* at 40a-43a). The court added that there was no warrant to permit artful pleading to allow the veterans to bring their claims here because "the weight of present scientific evidence does not establish that Agent Orange injured military personnel in Vietnam" (*id.* at 43a), and noted that "[a]pplication of the discretionary function rule leads ineluctably to the same result" (*id.* at 41a).

In its opinion specifically addressing the claims of petitioners, the court of appeals held that the claims of the veterans' wives and children were also barred (Pet. App. 21a-27a). The court noted that it would be anomalous for " 'a serviceman-husband performing his military duty * * * [to] be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is allowed recovery as a consequence of the same set of facts.' " *Id.* at 25a (quoting *Harrison* v. *United States,* 479 F. Supp. 529, 535 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.) (Table), cert. denied, 449 U.S. 828 (1980)). As in *United States* v. *Shearer,* 473 U.S. 52 (1985), the court concluded (Pet. App. 26a), a claim on behalf of a spouse or child challenging the government's decision to use Agent Orange in Vietnam would call into question military decisions, and hence is barred by the rule of *Feres.* The court added that "[w]here, as here, the military decision is of such a nature that it properly may be termed a discretionary function, denial of recovery by both military and nonmilitary personnel is doubly warranted" (*id.* at 26a-27a).

2. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

a. The court of appeals correctly concluded that petitioners' claims are barred by the discretionary function exception. As the court of appeals stated (Pet. App. 39a-40a), the discretionary function exception serves to insulate governmental policy-making, including (perhaps *especially* including) discretionary military decisions, from judicial scrutiny.[1] There can be no question that the decision to use Agent Orange in Vietnam was a policy decision of the sort covered by the discretionary function exception. *Dalehite* v. *United States,* 346 U.S. 15, 37 (1953). And, as the court of appeals noted (Pet. App. 41a), numerous courts have held that the exception bars claims alleging failure to warn where the exercise of discretion was involved. *Ford* v. *American Motors Corp.,* 770 F.2d 465, 467 (5th Cir. 1985); *Cisco* v. *United States,* 768 F.2d 788, 789 (7th Cir. 1985); *Begay* v. *United States,* 768 F.2d 1059, 1066 (9th Cir. 1985); *Shuman* v. *United States,* 765 F.2d 283, 291 (1st Cir. 1985); *General Public Utilities Corp.* v. *United States,* 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985); *Green* v. *United States,* 629 F.2d 581, 585-586 (9th Cir. 1980). The decisions petitioners challenge—whether to use Agent Orange

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[1] This Court has repeatedly stated that " '[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.' " *Chappell* v. *Wallace,* 462 U.S. 296, 301 (1983) (quoting *Orloff* v. *Willoughby,* 345 U.S. 83, 94 (1953)). It has also noted: "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan,* 413 U.S. 1, 10-11 (1973) (emphasis in original).

to assist in combat and whether to warn veterans of its possible harmful effects—are quite plainly "of the nature and quality that Congress intended to shield from tort liability." *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 813 (1984). Furthermore, as the court of appeals concluded, "[t]he very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion" (Pet. App. 43a).

Petitioners concede that the decision to use Agent Orange in Vietnam "could very well have been a discretionary function" (Pet. 26). They nevertheless contend that their claim is not barred by the discretionary function exception because the negligence they allege "relate[d] not to the making of that decision but solely to the manner in which that decision was carried out" (*ibid.*). They allege that the government was negligent because "[t]he state of the art under war conditions was such that certain methods of spraying, use of prophylatic [*sic*] and protective gear, medical monitoring and other steps could have been taken to drastically reduce the exposure to, and risk of harm from, Agent Orange, without adversely affecting our soldiers' capability to do battle" (*id.* at 8). However, we think that it is perfectly plain that decisions relating to matters such as what sorts of gear combat personnel can wear without adversely affecting their capability to do battle are discretionary decisions to be made by military decision-makers, and are not subject to second-guessing by way of tort suits.[2] Accordingly, petitioners' claims are

[2] The case on which petitioners rely (Pet. 27-28) in arguing that the discretionary function exception does not bar their claims, *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is clearly inapposite. The alleged negligence there—not keeping a lighthouse operational—is simply not comparable to decisions relating to how to conduct a war. Moreover, the government did not allege that the discretionary function exception barred the suit (*id.* at 64), so that exception was not at issue.

barred by the discretionary function exception.

b. Because petitioners' claims are plainly barred by the discretionary function exception, this case does not present an opportunity to overrule *Feres,* which is what petitioners' primarily seek (Pet. 11-14). Of course, we think that *Feres* was correctly decided. In any event, there is no good reason to revisit this Court's construction of the FTCA, made shortly after it was enacted, nearly four decades later. *Feres* is settled law under the FTCA and, if the Court erred in *Feres,* then, as it noted, "Congress possesses a ready remedy" (340 U.S. at 138). Moreover, this Court reaffirmed *Feres* just last Term in *United States* v. *Johnson,* No. 85-2039 (May 18, 1987).

Nor is there any basis for review of the lower courts' rejection of the various exceptions to *Feres* that petitioners seek to create. With respect to the veterans' claims based on exposure to Agent Orange in Vietnam, petitioners contend (Pet. 18-19) that *Feres* should not bar claims because they have been denied veterans' benefits. They allege that "to say administratively that the injuries are not service-connected and to say in court that they are incident to service smacks of inconsistency" (Pet. 19). As the court of appeals recognized (Pet. App. 42a), that argument "is a distortion of the Government's position." The government has consistently contended, as the court of appeals concluded (*id.* at 43a), that the ailments that petitioners suffer were not caused by exposure to Agent Orange, and their claims for veterans' benefits were denied on that basis. But, assuming arguendo that they were harmed by exposure to Agent Orange in Vietnam, then a tort suit seeking a remedy for that harm is barred by *Feres.*

As both of the courts below concluded, there is no merit to petitioners' arguments (Pet. 17-23) that *Feres* does not bar their claims based on pre-induction and post-discharge negligence barred. The courts below were clearly correct in deciding that petitioners' pre-induction claims are inex-

tricably intertwined with their in-service claims, and petitioners cite no appellate case (and we know of none) finding liability in such circumstances. As for the post-discharge claim, this case is clearly different than *United States* v. *Brown,* 348 U.S. 110 (1954), where negligent treatment in a Veterans' Administration hospital following discharge was found actionable despite *Feres.* The government's alleged negligence here is not a clearly separable wrong, such as a subsequent negligently-performed operation, but is merely a failure to warn of dangers encountered during active service. A number of courts of appeals have rejected similar attempts to circumvent *Feres. Hamilton* v. *United States,* 719 F.2d 1, 1 (1st Cir. 1983); *Gaspard* v. *United States,* 713 F.2d 1097, 1101 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Lombard* v. *United States,* 690 F.2d 215, 220-223 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown,* 683 F.2d 261, 265-267 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Henning* v. *United States,* 446 F.2d 774, 777-778 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

Two courts of appeals have held that claims alleging post-discharge failures to warn about exposure to radiation encountered during military service were not barred by *Feres. Cole* v. *United States,* 755 F.2d 873, 876-880 (11th Cir. 1985); *Broudy* v. *United States,* 722 F.2d 566, 569-570 (9th Cir. 1983). In both of those cases, however, the complaints were ultimately dismissed after remand as barred by the discretionary function exception. *Broudy* v. *United States,* Civ. No. 79-2626 (C.D. Cal. Dec. 17, 1985); *Cole* v. *United States,* 635 F. Supp. 1185, 1190-1191 (N.D. Ala. 1986); see also *In re Consolidated United States Atmospheric Testing Litigation,* 616 F. Supp. 759, 771-777 (N.D. Cal. 1985), aff'd, 820 F.2d 982 (9th Cir. 1987).[3] Accordingly, there is no reason to consider whether claims

[3] The district court had concluded (603 F. Supp. at 244) that *Broudy* and *Cole* are distinguishable from this case for several reasons. "First, the servicemen in these cases were exposed to such

based on post-discharge failures to warn are barred by *Feres,* since such claims are barred in any event by the discretionary function exception.

Finally, there is no reason to review the court of appeals' holding that the claims brought by the wives and children of veterans are barred. Those claims, which petitioners acknowledge were framed "to take advantage and use every possible mechanism to plead around the 'incident to service' doctrine" (Pet. 5), are, as the district court concluded (603 F. Supp. at 246, 247), without any scientific basis. Furthermore, there is no conflict in the circuits; the other courts of appeals to consider the matter have held, like the court below, that such claims are barred by *Feres. Hinkie* v. *United States,* 715 F.2d 96, 98-99 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Gaspard* v. *United States,* 713 F.2d at 1101-1102; *Mondelli* v. *United States,* 711 F.2d 567, 568-570 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Lombard* v. *United States,* 690 F.2d at 223-226; *Scales* v. *United States,* 685 F.2d 970, 973-974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Monaco* v. *United States,* 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); cf. *West* v. *United States,* 729 F.2d 1120 (7th Cir. 1984), aff'd, 744 F.2d 1317 (1984) (dismissal of claims on behalf of children affirmed by an equally divided court), cert denied, 471 U.S. 1053 (1985). Accordingly, there is no basis for review of those claims.

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large doses of radiation as to approach the level of intentional experimentation * * *. Second, they involved exposure to radiation, a substance considered far more likely to cause adverse health effects than was Agent Orange. Finally, imposing on the Veterans' Administration a duty to warn of the uncertain consequences of Agent Orange exposure might well encounter another hurdle—the discretionary function exception * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DONALD B. AYER
*Acting Solicitor General**

DECEMBER 1987

* The Solicitor General is disqualified in this case.

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